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De Chazeau & Kahn, Integration and Competition in the Petroleum Industry (1959) 53

Edwards, The Price Discrimination Law (1959) .. 36, 41, 57

Moody's Industrial Manual (July, 1968) 8, 33

Note, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570, 581-85 (1964) 75

Prewitt, Reply to Professor Dixon's Comment on the Federal Trade Commission's Report on Gasoline Marketing, 13 Anti. Bull. 1383 (1968) 48

The Federal Trade Commission's Report on Anticompetitive Practices in the Marketing of Gasoline (June, 1967) 34, 52, 62

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Timberlake, Federal Treble Damage Antitrust Actions (1965) 74

Wilson, Recent Antitrust Developments Affecting Independent Businessmen in the Oil Industry, 9 Anti. Bull. 559 (1964) 34

H. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 56

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 624

CLYDE A. PERKINS, *Petitioner*,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 396 F. 2d 809 (A. 104-17). The court's opinion denying rehearing is reported at 396 F.2d 817 (A. 103-04). The court's opinion on motion for clarification is incorporated in the final two paragraphs of the main opinion, *id.*, at 817. (A. 102).

JURISDICTION

The jury verdict was rendered December 20, 1963 (A. 99-101). The judgment of the court of appeals was entered November 2, 1967 (A. 104). A petition for rehearing was denied on July 11, 1968, and a judgment on motion for clarification also was entered that same day (A. 102, 103). The petition for a writ of certiorari was filed on October 9, 1968, and it was granted January 13, 1969. 393 U.S. 1013. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner Clyde A. Perkins—formerly one of the largest independent gasoline wholesalers and retailers in the Pacific Northwest—brought this action against Standard Oil Company of California charging that Standard violated Section 2 of the amended Clayton Act by selling gasoline at substantially lower prices to a competing wholesaler in the area and by not making available to petitioner payments, services and facilities granted to other Pacific Northwest retailers. Petitioner alleged that as a result of Standard's discriminations he was driven out of business. The jury returned a verdict in favor of petitioner, and it assessed actual damages of over $330,000. The court of appeals set aside the entire verdict because some of petitioner's proof on the Section 2(a) aspects of his claim demonstrated (*i*) that the wholesaler obtaining the discriminatorily lower price, Signal Oil & Gas Company, resold the gasoline to one of its subsidiaries, Western Hyway Oil Company; (*ii*) that that subsidiary, in turn, resold to one of its subsidiaries, a retail marketing chain, Regal Stations Co.; and (*iii*) that Regal—to which the benefits of the discriminatorily lower price had

been passed—precipitated a price war which adversely affected petitioner's overall wholesale and retail business. The court ruled, as a matter of law, that "Section 2(a) of the Act does not recognize a causal connection, essential to liability, between a supplier's price discrimination and the trade practices of a customer as far removed on the distributive ladder as Regal was from Standard." The questions presented are:

(1) Whether Standard's discrimination in price between competing wholesalers—which substantially lessened competition in the Pacific Northwest wholesale and retail gasoline markets—is immune from attack under Section 2(a) of the Clayton Act solely because the most direct and immediate competitive injury was felt at the retail level and, in reaching that level, Standard's gasoline was resold by the favored wholesaler to a majority-owned subsidiary which, in turn, resold again to its majority-owned retail outlets.

(2) Whether the jury's damage award to petitioner, considered in light of the record evidence and the district court's instructions, should have been upheld as a just and reasonable estimate of the amount of damages sustained by petitioner as a result of Standard's unlawful price and price-related discriminations against him.[1]

STATUTES INVOLVED

(1) Section 2 of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C. § 13, provides in pertinent part as follows:

> "[Sec.] (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate

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[1] Petitioner raises question (2) above pursuant to footnote 7, page 13, of the petition for certiorari.

in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

(2) Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, reads as follows in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT

1. Proceedings Below

On March 2, 1959, petitioner, Clyde A. Perkins, brought suit against respondent, Standard Oil Company of California (Standard), to recover treble damages for injuries resulting from Standard's price and price-related discriminations in the sale of gasoline and oil to petitioner in violation of Sections 2(a), (d) and (e) of the Clayton Act from March 2, 1955, through December 2, 1957. On December 20, 1963, after a protracted trial, the jury returned a verdict for petitioner and assessed $336,404.57 in damages against Standard. The court trebled the award and, after a separate hearing, allowed Perkins $289,000 as attorney's fees for a total judgment against Standard of $1,298,213.71.

Standard appealed to the United States Court of Appeals for the Ninth Circuit. Oral argument was presented in June 1965, and, on November 2, 1967—almost four years after the jury verdict—the court of appeals reversed the district court judgment and remanded the case for a new trial. This Court granted certiorari on January 13, 1969.

2. The Persons Involved

(a) Petitioner

Petitioner Clyde A. Perkins was one of the largest independent distributors of gasoline and oil in the Pacific Northwest States of Washington and Oregon (Ex. 4A, 4B, 5, 6, 21A).[2] He started in the petroleum business in 1928 as the operator of one service station in the State of Washington (A. 118-19). During the next several years Perkins acquired and built many more stations both in Washington and Oregon. He also became a wholesaler in this area, operating trucking equipment and bulk storage plants, and selling gasoline to other wholesalers, retailers, and commercial users (A. 105; Ex. 99).

In 1945, as the result of discussions initiated by Standard, Perkins, together with Messrs. Lee Powell and Robert Harris, two other independent gasoline dealers, entered into the first of a series of supply con-

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[2] The parties' documentary evidence is cited as "Ex. —." Ex. 1-429 were introduced by petitioner; Ex. 1000A-1715B were introduced by Standard. "Tr. —" references are to the unprinted transcript of proceedings in the district court. "R. —" references are to the district court file of pleadings and other matters not included in the transcript of testimony. All references to those portions of the record contained in the printed Appendix are cited as "A. —." References to printed documents are cited to their exhibit numbers and Appendix pages, *e.g.*, Ex. 93-B, A. 542. The places in the record where each cited exhibit was offered and received in evidence are listed in Appendix A to this brief, pp. 78-79, *infra*.

tracts with Standard, under which Perkins purchased substantially all his gasoline requirements from 1945 through December 1957 (A. 105, 122-25; Tr. 1624-28; Ex. 1).[3] Using the trade name "Champion," the Perkins-Powell-Harris business expanded rapidly, and by the mid-1950's they were selling over 30,000,000 gallons of petroleum products annually, 52 percent of which flowed through Perkins outlets (Tr. 1626-27; Ex. 23H, 82, A. 518, 528-39). By the mid-1950's Perkins himself was selling over 8 percent of Standard's total gallonage in the Pacific Northwest while operating only in less than one-third of the area (Ex. 2, 102, 1449, A. 493, 549, 587; Ex. 4A, 4B; Tr. 1626; A. 373-74).

In 1952 petitioner organized two corporations—Perkins Oil Company of Oregon and Perkins Oil Company of Washington—to which he transferred his gasoline and oil business and leased all his bulk plants and most of his service stations (A. 105-06, 131-34; Tr. 154-74).[4] No real estate was ever deeded to or purchased by the corporations (A. 137-38). Although the corporations continued to carry on the wholesale business, they sublet most of the service stations (A. 105-06). Those stations not leased to the two corporations either were operated by Perkins[5] or leased to third parties

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[3] Prior to 1945 Perkins had been a distributor for Sunset Oil Company (Sunset), an affiliate of Tidewater Oil Company, in Southwest Washington, and for Gilmore Oil Company in Oregon. Gilmore was acquired in 1945 by Standard Oil Company of New York (Mobil) (A. 119-20).

[4] Petitioner brought this case on his own behalf and on behalf of the above two corporations, which had assigned to him their claims against Standard (A. 110).

[5] Hereafter "Perkins" and "petitioner" include Clyde A. Perkins individually and Perkins Oil Company of Oregon and Perkins Oil Company of Washington.

(A. 133-34, 167-73; Tr. 1579-80). During the claim period approximately 60 retail stations were being leased or operated by petitioner, all of which utilized the "Champion" trade name (Tr. 2925).

On December 2, 1957, Perkins went out of business as a result of the injury caused by Standard's price and price-related discriminations against him; he closed out by leasing the remnants of his enterprise to a major oil company, Union Oil Company of California (Ex. 1003).[6]

(b) Standard

Standard Oil Company of California, a billion dollar corporation, is engaged in all aspects of the gasoline and oil industry; it refines crude oil, transports and stores gasoline, and sells gasoline to wholesalers, retailers, commercial users and directly to the motoring public (Tr. 4914, 5630). During the period involved here Standard had the largest share of the Pacific Northwest gasoline market (nearly 30 percent), and it was the price leader in the area (A. 373; Tr. 481, 4940, 4945-46, 5628, 5630). Standard's principal delivery terminals in the Pacific Northwest were located at Point Wells (Richmond Beach) near Seattle and Willbridge in Portland (Ex. 280B-1, 1524). In addition to Perkins, Standard sold gasoline in the Pacific Northwest to its "Branded Dealers" (see A. 106 and fn. 2), who were retailers, and to wholesalers such as Signal Oil & Gas Company (A. 202-06, 213-15, 217-19).

[6] Messrs. Powell and Harris, who conducted their businesses with that of Perkins until the end, were granted by Standard, in January 1958, a retroactive adjustment of $40,370.00 (Ex. 23D, p. 25). Neither joined Perkins in this lawsuit, and both were made nominal defendants by the district court after Standard argued that they were indispensible parties (R. 36, 79).

(c) **Signal**

Signal Oil & Gas Company (Signal)[7] is a large, completely integrated producer and distributor of gasoline throughout the Western United States (A. 202-08, 413-14; Tr. 387-97, 763). Signal has been both a supplier to and customer of Standard since January 1932, when the companies entered into a contract (renewed in 1937) under which Standard agreed to purchase crude oil and natural gas from Signal and, in return, to supply Signal with its requirements of refined motor gasoline (A. 412-14).

During the 1940's Signal grew substantially in size; and by 1946 it was supplying Standard with approximately 45,000 barrels of crude oil a day (A. 413-14, 417-18; Tr. 5559). Recognizing the importance to Standard of this supply of crude, the companies began to renegotiate their contract in 1945, three years prior to its expiration date (A. 413-19).[8] After reaching an impasse over the price of the refined gasoline to be sold to Signal, it was agreed that on July 1, 1947, Standard would purchase Signal's marketing business and facilities, including bulk plants, commission distributors, motor equipment, retail stations and the "Signal" trademark (A. 416-17, 419-20; Tr. 754).[9] At Signal's insistence,

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[7] After the trial of this case, Signal Oil & Gas Company changed its name to Signal Companies, Inc. Moody's *Industrial Manual*, p. 2126 (July 1968).

[8] Commenting upon the necessity for Standard to be assured of access to Signal's crude oil supply, Mr. Darwin Godfrey, the Standard executive who had negotiated both supply contracts with Signal, stated:

> "[O]ur refineries were geared, of course, to that volume of crude oil. We actually had to have it to meet our commitments." [A. 413.]

[9] Approximately 98 percent of Signal's marketing personnel went with Standard after the acquisition (Tr. 751).

Standard reluctantly agreed also to permit Signal to re-enter the gasoline marketing business and to supply Signal with refined gasoline (A. 417-18). Substantially all of Signal's crude and natural gas production had been committed to Standard under the 1937 agreement; the same was true of the 1947 renewal (Tr. 757).

Signal began purchasing refined gasoline from Standard at its Point Wells terminal in 1955 and at its Willbridge terminal in 1956 (A. 203-04). Between 1955 and late 1957, virtually all of Signal's regular and ethyl gasoline was obtained from Standard (A. 204), and during that period Signal became one of Standard's largest purchasers in the Pacific Northwest (Ex. 23H, A. 511, 513, 518, 523). Although Signal operated as a wholesaler in the area, it did not directly own any trucks or storage facilities there (A. 231, 393). Signal transferred much of the gasoline it purchased from Standard to its subsidiary Western Hyway Oil Company (Western Hyway), and it also sold to independent jobbers (A. 205, 282).

(d) Western Hyway

Western Hyway, a trucking company without storage facilities in the Northwest (A. 392), was incorporated in 1950 with Signal owning 60 percent of its stock (A. 205, 392-93).[10] Substantially all the gasoline handled by Western Hyway during the claim period came from Signal (A. 210-11, 394), and Signal treated its transfers of gasoline to the trucking company as sales (A. 109 fn. 6, 210, 393-94; Tr. 4745). Western Hyway in turn sold that gasoline to Regal Stations Co. (Regal), its main customer in the Portland area (A. 210-11, 393-94).

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[10] In the early 1960's Signal acquired all of Western Hyway's stock (A. 205-06).

(e) Regal

Regal was incorporated in Oregon in 1956, with Signal's subsidiary Western Hyway apparently owning 55% of its stock (A. 393). Subsequently, in October 1957, Western Hyway acquired 100 percent ownership of the company (*ibid.*). Regal operated a chain of retail stations, three of which were located in the Portland area (*ibid.*; Tr. 527-28; Ex. 1465). The Portland retail outlets were opened in October 1956, December 1956, and January 1957 (Tr. 527-28), and Regal competed with stations supplied and owned by Perkins (Tr. 644-745, 787-93, 886-907; A. 248-56, 258-60, 263-71).

In addition to Regal Stations Co., Signal "had dozens of" other Regal companies (A. 395-96), including Regal Stations, Inc. and Regal Petroleum Co., both of which operated in California (A. 206-09). The Regal corporations in California purchased gasoline directly from Signal (A. 205).[11]

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[11] There was considerable confusion within the Signal organization about the existence and identity of the various Regal companies. According to one Signal official, in 1954 Signal acquired a 75 percent interest in Regal Petroleum Co. and a 60 percent interest in Regal Stations, Inc. and also had a 60 percent interest in Regal Petroleum Corp. of Sacramento, which was merged into Regal Stations, Inc. in 1956 (A. 206-07). On the other hand, Mr. Ross Grover, the auditor for Western Hyway and all the Regal companies since their formation (A. 392, 395), stated in response to a question about a reference in Signal's 1957 annual report to Regal Petroleum Company: "[I]n 1957 there was no such organization to my knowledge. . . . It says 'Regal Petroleum Company, the retail marketing subsidiary with outlets' . . . in multiple states. I think this statement itself in that shareholders' report is in error. It should read 'The Regal Companies' because they had dozens of them" (A. 395-96).

Moreover, at least one Signal official believed that Regal Stations Co., the "Regal" involved here, was a subsidiary of Regal Stations, Inc., not Western Hyway, from 1955 through January 1958 (A. 202, 206, 209).

(f) The Branded Dealers[12]

Standard also sold gasoline directly to the independent operators of its Chevron and Signal[13] stations who marketed under Standard's brand names. These Branded Dealers operated numerous retail service stations in the Pacific Northwest, and they competed with petitioner's retail stations and the retail stations supplied by him (Tr. 590, 1230, 2928-29; A. 239-40).

3. Standard's Discriminations in Their Commercial Context

(a) The Structure of the Pacific Northwest Market

The following major oil companies are active in the Pacific Northwest petroleum market: Standard, Shell Oil Company, Texaco, Inc., Mobil Oil Company, Union Oil Company of California, Richfield Oil Company and Tidewater Oil Company (A. 272, 285). Of these, Standard had the largest market share and was the price leader during the claim period (Tr. 4945-46, 5628, 5630; A. 373).

The majors had almost exclusive control over the supply of petroleum products in the Pacific Northwest. All refineries in the area were owned by the majors, with the exception of one small facility operated by Time Oil Company in Tacoma, Washington, which produced only a lower-grade "house brand"

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[12] "This is the term applied in the trade to proprietors of retail service stations whom Standard authorized to use its brand names in their advertising" (A. 106 fn. 2).

[13] The Signal stations were operated under the authorization of the Signal Oil Company, a subsidiary of Standard (A. 418-19). Standard's Signal Oil Company subsidiary was created out of the retail distribution system of Signal Oil & Gas Company acquired by Standard prior to this litigation (see pp. 8-9, *supra*); during the claim period it was not connected with Signal Oil & Gas Company.

gasoline (A. 137, 330). There only was one pipeline into the area during the claim period, and the evidence indicated it was owned by Standard (A. 330; Tr. 1914-15). No gasoline was brought into the area by rail (A. 331-32), and trucks were not used to transport petroleum products from the San Francisco Bay Area to the Portland-Vancouver area (Tr. 1121, 4766; A. 274).[14]

Most petroleum products came into the Portland-Vancouver area by marine tankers operated by the majors (A. 332). The marine terminals in Oregon and Washington during the claim period also were under the control of the majors, with the exception of one operated by Time Oil Company (A. 136, 330) and one operated by another independent which discontinued business (A. 332-34).[15]

Thus, there was uncontroverted evidence that the major oil companies had command over the supply of petroleum products in the Pacific Northwest in general, and the Portland-Vancouver area in particular. There also was uncontroverted evidence that the relative importance of independent gasoline jobbers in the petroleum industry declined in terms of their combined market share between 1952 and 1958 (Tr. 1148-51; A. 286)—a trend substantiated in the Pacific Northwest by Perkins' demise and the ultimate takeover of his enterprise by Union Oil Company, Sunset's sale of its retail stations to Union and the discontinuance of business by an independent terminal operator.

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[14] Transportation of petroleum products by truck is economically feasible only for distances under 275 miles (Tr. 1121; A. 135-36).

[15] At one time another independent terminal was operated by Sunset (A. 332). Sunset's service stations were acquired by Union during the claim period (Tr. 1905).

(b) The Nature of Standard's Discriminations

Standard sold gasoline of like grade and quality to Perkins, Signal, and its Branded Dealers from its bulk storage facilities in the Pacific Northwest (A. 107, 297-98; Tr. 1346). It is uncontested that Standard sold at lower prices to Signal than to Perkins (A. 441; Tr. 5468-69, 5575),[16] and there was substantial evidence from which the jury could have found that Standard also discriminated in price in favor of its Branded Dealers and against Perkins (A. 107, 213-14, 217-18, 228-29, 234-35, 247, 291, 440-41; Tr. 455-59, 4522-23, 5558-59; Ex. 343A, 343B, A. 572, 575). There also was substantial uncontroverted evidence that the Branded Dealers and other retailers purchasing Standard gasoline through Signal had received from Standard numerous other benefits (such as advertising allowances) which had not been made available to Perkins' retail stations or the retail stations supplied by him (Ex. 2, 106C, A. 493, 559; A. 213-14, 217-18, 228-29, 291; Tr. 452-59, 557-58, 629-30). The impact of these price and price-related discriminations upon Perkins' previously successful and expanding business was catastrophic: He was driven from the market within two years after Standard began supplying Signal in the Pacific North-

[16] For more than two years after this case was filed, Standard denied (in its answers to the complaint and Perkins' interrogatories) any price discrimination in favor of Signal (R. 119; Ex. 23B). On the day prior to the deposition of Signal's president—and after Signal's records had been subpoenaed—Standard admitted having granted Signal rebates exceeding $1,000,000 which it stated had previously been overlooked (Ex. 23C, 1515B). A substantial portion of those rebates was directly allocable to gasoline purchased by Signal in the Pacific Northwest (Tr. 5607, 5901; Ex. 23C).

west (Ex. 93B, 93C, A. 542, 543; Ex. 1003; A. 375-77) and accelerating its discriminations in favor of the Branded Dealers (A. 247; Tr. 630; Ex. 343A, 343B, A. 572, 575).

(1) *The Centralia Area*

Standard began supplying Signal from its Point Wells terminal near Seattle in 1955, and Signal then entered, as a wholesaler, the Centralia market in Washington (A. 203; Tr. 252, 2451, 2988, 3392-93). One of Signal's customers, a trucker, soon began making direct sales to two independent retailers who formerly had been regular customers of Perkins (Tr. 252, 1057, 2450-51, 2681, 3081-84, 3390-95, 3455; Ex. 282C-5). In an effort to retain one of these customers, petitioner reduced his margin by more than 90 percent but still was unable to beat the trucker's price (A. 362-63). At trial it was shown that because of Signal's discriminatorily lower price from Standard, Signal was able to supply the trucker at a lower price than petitioner had paid in purchasing directly from Standard (Tr. 2696-97), thus enabling the trucker easily to take away customers from Perkins (Ex. 235, 335; Tr. 2103; A. 362-64).

Following Signal's entry into the Centralia market, a severe price war began—initiated by retail stations to which Signal had passed the benefits of Standard's price discriminations in its favor (Tr. 1341; A. 299, 304-05). In most profitable retail stations gasoline prices to the public are generally 6 cents per gallon above the so-called tank wagon or wholesale price paid by the dealer (Ex. 343B, A. 575; Tr. 4523; A. 328). During the depths of the price war in the Centralia area, however, the retail price dropped as low as 4 cents

below the tank wagon price (A. 328; Ex. 81J, K, S, T, U, 1453X, Y, AA, BB).[17]

During this price war Standard heavily subsidized its Branded Dealers in accordance with a sliding scale down to a fixed irreducible margin of 3½¢ per gallon (later raised to 4½¢), after which Standard absorbed any additional decreases in retail prices (Ex. 343A, 343B, A. 572, 575). Standard provided no comparable assistance to Perkins or the retailers supplied by him (A. 280; Tr. 997, 2925).[18] As a result, during the price war the Branded Dealers, who were retailers, often purchased gasoline from Standard at lower net prices than Perkins, who operated primarily as a wholesaler (Ex. 81J, K, S, T, U, 1453X, Y, AA, BB). Furthermore, during this period numerous other advantages extended to the Branded Dealers were not made available to the retail stations operated and supplied by petitioner. These advantages included use of Standard's credit card (worth 1¾¢ per gasoline gallon) rest room and maintenance allowances (worth ¼¢ per gallon), advertising allowances, free delivery services, free station painting, and the right to indicate they were selling major brand gasoline (worth 2¢ per gallon) (Tr. 791-92, 890, 965-77, 1344, 1439, 2948, 3274, 4593; Ex. 343B, A. 575; A. 218-19, 227, 285, 316-17).

[17] At one point during the claim period, Standard notified all division managers that retail dealers should have margins "approaching 6¢, if they are to continue in business profitably" (Ex. 343B, A. 575). Another Standard official testified that no jobber could get by with less than a 2¢ margin (A. 365).

[18] To illustrate, the total amount of subsidies Perkins received for all sixty stations during the entire claim period was less than the amount paid by Standard to a single Signal dealer in Centralia during a period of less than 75 days (Tr. 554, 2925). See pp. 18-20, *infra*.

(2) *Signal, Western Hyway and Regal— The Portland Area*

In mid-1956 Standard also began supplying Signal from its Willbridge terminal in Portland (A. 203), and shortly thereafter three Regal stations opened in the area (Tr. 527-28). These Regal stations were supplied all their gasoline requirements by Western Hyway which had obtained Standard gasoline from Signal (A. 187, 201, 207, 210). Soon after they opened, the Regal stations dropped the price of gasoline below the generally prevailing price in the Portland area (A. 222-30; Tr. 507-13, 517-22); they also advertised that they accepted major oil company credit cards and touted their gasoline as a "Major Brand" (A. 252-53, 287-88, 318; Tr. 460-61, 728; Ex. 106C, A. 559).

Regal's entry into the Portland area broke the existing price structure and precipitated a major price war which greatly upset the entire market (Tr. 456, 518-22, 605-12, 645-64, 792, 886-985; A. 222-25, 227, 244-46, 259). Within a few days after the first Regal station opened, the retail price of gasoline in Portland dropped approximately 4¢ per gallon, approaching the tank wagon price (A. 198-99). Witnesses variously described Regal's impact as a "big blast," and a "bombshell" that "started our broke pricing" (A. 229, 259, 263-64). While there had been price disturbances in the Portland area prior to Regal's entrance, these were characterized as minor in comparison with the plummeting price structure caused by Regal (A. 263-64, 267-68). During the price war, truckers, for example, would buy just enough gasoline (*e.g.*, 20-30 gallons instead of 100 or 120) to drive them from so-called non-depressed areas to the nearest area of depressed prices, because the savings there were so substantial (Tr. 691-706, 707-24; A. 253-55, 269-71).

The effects of the sharp price downturn precipitated by Regal were far-reaching, going beyond the diversion of business from Portland retail stations supplied by petitioner. The retail prices in close-by Vancouver immediately experienced a severe downward reaction (A. 259, 266-67, 298-99). Moreover, the price decline in Portland-Vancouver area soon spread throughout much of the Pacific Northwest (A. 266-69). Petitioner, in sum, introduced substantial evidence to prove that the price and price-related discriminations which Signal received from Standard and passed on to its subsidiary, Western Hyway, and then to Regal, Western Hyway's subsidiary, enabled Regal to upset competitive conditions throughout the market (Tr. 519, 956-57, 985; A. 189-90, 223-24, 226-30, 245, 249, 258-60, 263-64, 266-68, 270-71). As the court of appeals observed in describing this situation (A. 108-09 fn. 6):

> "Regal commenced to retail gasoline and oil in Portland during the summer of 1956 and soon was operating a number of service stations there. It accompanied a well publicized entry into the market with a scale of prices well below that of other retailers and persisted in undercutting other retailers. Perkins took the position, which he supported with substantial evidence, that 'While there had been some price disturbances in the Portland area prior to Regal, these were . . . of "brush fire" dimensions while Regal precipitated a major conflagration'; and he further adduced proof tending to show that the impact of Regal's price policy went far beyond Portland; that it precipitated and sustained a sort of chain-reaction throughout Perkins' entire marketing area, and that it adversely affected both the wholesale and retail business carried on by Perkins."

In recognition of the seriousness and far-reaching impact of the Regal price war, Standard subsidized Branded Dealers located many miles distant from Portland, in order to enable them to respond to the sharp price downturn (Tr. 629-30; A. 247-48, 288-89; Ex. 343B, A. 575). Again, no comparable price or price-related assistance was made available to Perkins (Tr. 997; A. 280). On the contrary, Standard resolutely prohibited Perkins from giving any indication that his products came from a major oil company (Tr. 147, 1427-28) despite Perkins' repeated requests to do so (A. 287-89). In addition, Perkins was precluded by Standard from honoring the majors' credit cards (Tr. 1903; A. 288-89).

(c) Standard's Awareness of Perkins' Plight

During the claim period Perkins repeatedly requested assistance from Standard and notified Standard of the deteriorating price structure in his area. For example, Perkins sent a letter to Standard, dated April 29, 1955, notifying it that Signal stations in Centralia were advertising regular gasoline at 26.4¢ per gallon, in contrast to a tank wagon price of 26.5¢. The letter noted that the Perkins distributor in the area, Carter Oil Company, currently was selling at 27.9¢, but would have to drop to 26.4¢ shortly. (Ex. 63; Tr. 2907-08.)

Prior to signing a 1956 supply contract with Standard, Perkins went to Los Angeles and attempted to open negotiations with several oil companies including Signal (A. 185-86). Signal offered Perkins prices lower by ¾¢ on regular gasoline and $\frac{9}{10}$¢ on ethyl than those offered him by Standard (*ibid.*). When Perkins informed Standard officials of Signal's offer, they de-

nied that Signal was getting a better price and refused to increase Perkins' margin (A. 188, 192-95).

Perkins later discussed this matter with Mr. August Johnsen, President of S.O. Company, a Standard subsidiary, Mr. E. J. McClanahan, Vice-President of Standard, Mr. Howard Cuyler, General Sales Manager of Standard, Mr. Howard Vesper, Executive Vice-President in charge of Standard's Western marketing, and Mr. George Hargens, another Standard executive (A. 289). It was admitted during one of these discussions that Signal was paying Standard a lower price than was Perkins (A. 188-89).[19]

In the latter part of 1956, Perkins again requested subsidies equivalent to those provided Standard's Signal stations (A. 290-91). Mr. Vesper again denied that Standard gave any subsidies (A. 192), and he claimed Perkins' prices were identical to those paid by Signal (A. 193). Perkins' pleas and Standard's denials of the price and price-related discriminations against him continued for a substantial period of time (A. 194-97). Thus, in the spring of 1957, Perkins had another meeting with Standard's officers in San Francisco

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[19] Acknowledgment of Signal's lower price came during an argument between Johnsen and Hargens about Regal's entrance into the Pacific Northwest. Johnsen admonished Hargens (A. 189):

> " 'You have the authority to do it and I want you to stop Regal from going to the Northwest because, if they do, they will wreck that market because they have got a better price than either Clyde [Perkins] or my other jobbers have up there, and if they come up there, they will do the same thing there they have done other places. They will wreck that market.' "

Continuing, Johnsen added: " 'You [Hargens] can control this because you are selling the Signal Oil & Gas and they furnish, and they own Regal or furnish the gas for Regal.' " Hargens responded: " 'Yes, I know it, but . . . I can't control it'." (A. 201.)

where he explained that he "couldn't live under the present circumstances," and that Standard would have to help him (A. 291-92).

In the summer of 1957 Perkins met once more with Standard officials in San Francisco; at that time Mr. August Johnsen reiterated his previous admission of the existence of subsidies to Perkins' competitors (see fn. 19, p. 19, *supra*), and he told Perkins he would attempt to help (A. 294, 296-97). As a result, petitioner received a small subsidy in the fall of 1957 (Tr. 1264-66; A. 296-97)—shortly before he went out of business.

(d) The Adverse Impact of Standard's Discriminations

All aspects of petitioner's business were drastically affected by Standard's price and price-related discriminations in favor of Signal and its Branded Dealers in the Pacific Northwest. Prior to 1955 petitioner had enjoyed growth and financial success (A. 146). After Standard began discriminating in favor of Signal and its Branded Dealers, Perkins' gasoline volume decreased by 13 percent between 1955 and 1957. And he suffered net losses in each of those years. (Ex. 239, 283A; Ex. 93B, 93D, 284A, 284B, A. 542, 544, 563; A. 146, 151-52, 374) During the entire claim period Perkins' gross profit per gallon of gasoline was 1.54 cents (Tr. 3653-54).

No less dramatic was the decline in petitioner's fuel oil sales and income from his leased stations (Ex. 82G-1; Ex. 82G-2, A. 534; Tr. 820, 936). For example, petitioner sold approximately 4.4 million gallons of fuel oil in 1955, 3.6 million gallons in 1956 and only 2.4 million gallons in 1957 (Ex. 93C, A. 543; A. 375-76).

The record contains substantial evidence that these declines in Perkins' business fortunes were caused by Standard's price discriminations in favor of Signal and its Branded Dealers, which not only occasioned many persons to cease purchasing gasoline from customers of Perkins but also forced many of Perkins' customers to obtain gasoline from other suppliers (Tr. 588, 667-68, 691-95, 726-27, 734-35, 797, 3101-02; A. 239-40, 249, 252-56, 260; Ex. 349). And there was testimony before the jury that once a customer was lost for gasoline purchases, he also was lost as a fuel oil customer (Tr. 3074-79, 3572; A.370).

In marked contrast to Perkins' decline, Signal's business boomed. Its purchases from Standard in the Pacific Northwest jumped from 5,605,000 gallons in 1955 to 8,340,000 gallons in 1957—an increase of over 48 percent (Ex. 23H, A. 523).

Despite the competitive disadvantage at which Standard's policy of discrimination had placed Perkins, for over two years he struggled to continue as a viable independent distributor of gasoline. By December 1957, however, Standard's predatory discriminations had taken their toll. Perkins was forced to lease to a major oil company the remnants of a business it had taken 30 years to build—and one of the largest independent distributors of gasoline was effectively eliminated from the Pacific Northwest market (Ex. 1003).

4. The Judgments Below

After hearing this evidence and being properly instructed by the trial judge, the jury returned a verdict in favor of petitioner, assessing actual damages in the

amount of $336,404.57 (A. 101).[20] Pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, the trial judge trebled the jury award, and, after a separate hearing, awarded attorney's fees in the amount of $289,000 for a total judgment against Standard of $1,298,213.71 (A. 105).

The court of appeals reversed and remanded the case for a new trial. With respect to Standard's price and price-related discriminations in favor of its Branded Dealers, the court apparently agreed with Perkins that Standard had violated Sections 2(a), (d) and (e) of the Clayton Act, and that petitioner was entitled to recover damages caused by those discriminations (A. 107, 111-12). As to Standard's price discriminations in favor of Signal—which sold to retailers directly as well as through Western Hyway—the court ruled that because an indeterminate part of the damages assessed against Standard "necessarily" rested upon the marketing activities of Regal, a customer of Western Hyway, the entire jury verdict must be set aside (A. 108, 109). The Ninth Circuit reasoned that although the evidence proved that the impact of Regal's price cutting—supported by Standard's price

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[20] The above sum, denominated "general verdict," was divided by the jury into three parts, each labeled "special verdict," as follows (A. 105 fn. 1):

"'(1)	... on the first cause of action of Clyde Perkins individually	$185,022.52
"'(2)	on plaintiff's second cause of action of Perkins Oil Co. of Oregon	84,101.14
"'(3)	on plaintiff's third cause of action of Perkins Oil Co. of Washington	67,280.91[.]'."

discriminations in favor of Signal—"adversely affected both the wholesale and retail business carried on by Perkins" (A. 109 fn. 6), Section 2(a) of the Clayton Act, as a matter of law—

> "does not recognize a causal connection, essential to liability, between a supplier's price discrimination and the trade practices of a customer as far removed on the distributive ladder as Regal was from Standard." [A. 116.]

On the issue of damages, the court ruled that, as to Perkins' individual claim (see fn. 20, p. 22, *supra*), the trial judge properly permitted him to show "that the going concern value of his interest, as owner and lessor and as prime lessee and sublessee of service stations and bulk plants, substantially diminished" (A. 113). The court stated, however, that the trial judge had erred in admitting Perkins' evidence that, as a result of Standard's discriminatory practices, his two corporations defaulted on brokerage fees, rentals and other debts owed him, and that he was unable to collect rentals on service stations leased to independent operators (A. 113). Viewing Perkins as a third-party bystander, the court held: "'[T]he rule is that one who is only *incidentally* injured by the violation of the antitrust laws—the bystander who was hit but not aimed at—cannot recover against the violator'" (*ibid.*, emphasis in original).[21]

Finally, the court criticized an evidentiary ruling and a jury instruction by the trial judge, both involving Standard's meeting competition defense under Section

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[21] This ruling did not affect the damage claims of the two Perkins corporations (see A. 112).

2(b) of the Clayton Act, 15 U.S.C. § 13(b).[22] And it rejected Standard's argument that there had been reversible error involving Perkins' claims that Standard unlawfully discriminated against him by not making available to him payments, services, and facilities granted his competitors: "Neither did the court err in submitting to the jury Perkins' claims based upon Standard's alleged Section 2(d) and 2(e) violations" (A. 111). See also, in this regard, the court's opinion on petition for rehearing (A. 103).

SUMMARY OF ARGUMENT

I.

Section 2(a) of the Clayton Act contains two distinct tests of illegality. The first, the standard of the original Section 2 of the 1914 Clayton Act, prohibits price discriminations whose effect may be substantially to lessen competition in any line of commerce. The second, the standard of the 1936 Robinson-Patman amendments, prohibits price discriminations which injure, destroy or prevent competition with (*a*) the discriminating supplier (primary line injury), (*b*) the favored purchaser (secondary line), and (*c*) the customers of the favored purchaser (tertiary line).

[22] The Ninth Circuit stated, first, that Standard's evidentiary offer of sales records from a competitor's files, dated several months after Standard's price reduction, should have been accepted "despite its *ex post facto* nature" (A. 116). Secondly, it stated that, "standing alone," part of the trial judge's instruction on the meeting competition issue was clearly erroneous (A. 117). The court went on to observe, however, that that instruction did not stand alone, since the trial court also gave an instruction, requested by Standard, which correctly stated the rule" (A. 117 fn. 10).

In the present case, Standard sold gasoline to petitioner, a gasoline wholesaler and retailer, at prices higher than those charged a competing wholesaler (Signal) and competing retailers, causing the destruction of petitioner's business. The jury awarded petitioner over $330,000 in damages. A portion of the damages assessed against Standard was predicated upon the retail marketing activities of Regal, a purchaser of Standard gasoline from Western Hyway (Regal's parent corporation), which had previously purchased the gasoline from Signal (Western Hyway's parent). The Ninth Circuit, impressed with the form of the Signal-Western Hyway-Regal distributive chain, set aside the entire jury verdict on the ground that petitioner's damages suffered as a result of Regal's activities occurred at the fourth level of distribution and therefore were too remote to be cognizable under Section 2(a).

II.

A. Assuming *arguendo* that this case involves so-called "fourth line" injury not cognizable under the Robinson-Patman amendments, the court of appeals erred in imposing an artificial limitation on the scope of the "substantially to lessen competition . . . in any line of commerce" standard of Section 2(a). That standard, which was part of the original Section 2 of the Clayton Act, contains no functional level limitations; all it requires is proof that, as a result of the challenged price discriminations, there may be a substantial lessening of competition in any significant product and geographic market.

This Court's decision in *George Van Camp & Sons Co.* v. *American Can Co.,* 278 U.S. 245 (1929), a pre-

Robinson-Patman Act case, strongly supports the jury verdict against Standard. There, the Court flatly rejected the defendant's contention that the "in any line of commerce" language of the original Section 2 of the Clayton Act "must be confined to the particular line of commerce in which the discriminator is engaged," stating:

> "The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." [278 U.S., at 253.]

Thus, it is clear that the phrase "in any line of commerce" means exactly what it says—that a price discrimination causing the requisite competitive injury is unlawful regardless of the functional level in the favored purchaser's chain of distribution at which the competitive harm is first felt.

Moreover, the above interpretation of the "in any line of commerce" language of Section 2(a) accords with the uniform judicial interpretation of the same language in Sections 3 and 7 of the Clayton Act. The consistent decisions of this Court teach that commercial realities rather than arbitrary functional levels should be the standard for defining lines of commerce under all Sections of the Clayton Act.

B. On the facts of this case there can be no question that the jury properly could have concluded that the retailing and wholesaling of gasoline in the Pacific Northwest was a proper line of commerce in which to appraise the impact of Standard's price discriminations. Perkins was engaged in the wholesaling and retailing of gasoline only in the Pacific Northwest; that

also was the area in which he purchased his gasoline supplies; and the deteriorating price structure which caused his destruction was caused by Standard's discriminations in favor of his competitors in that area.

The jury likewise could properly have concluded that competition in this commercially significant product and geographic market was substantially lessened when Perkins—one of the area's largest independents—was driven out of business and supplanted by one of the major oil companies. This is particularly true since the price discriminations which caused his demise were granted by Standard—the most powerful supplier in the Pacific Northwest, furnishing nearly 30 percent of the area's gasoline gallonage; the price discriminations were continued for over 2½ years until Perkins went out of business; and they were granted in circumstances where Standard had every reason to know that Signal would pass along to Regal those discriminatory price advantages in order to injure Perkins.

C. The 1936 Robinson-Patman amendments to Section 2 of the Clayton Act, relied upon by the Ninth Circuit, did not alter the original Section 2 prohibition of price discriminations causing a substantial lessening of competition in any commercially significant market. Indeed, the legislative history of those amendments makes clear that Congress intended the original prohibition to remain in full force. To impose the functional level limitations of the Robinson-Patman amendments upon the original Section 2 test of illegality would reduce the latter to mere surplusage, in direct contravention of the intent of Congress to strengthen the Clayton Act provisions, not weaken them.

III.

Independent of the Ninth Circuit's error in holding that Section 2 of the Clayton Act has no applicability in so-called fourth line injury cases, the court fundamentally misconceived the nature of this case in failing to recognize that it involved second line injury. The trial court properly submitted to the jury the question whether Signal and Perkins, both of whom purchased from Standard, were competitors. And the evidence established that each purchased gasoline directly from Standard; each wholesaled its gasoline in the Pacific Northwest; and the retailers of each actively competed for the patronage of the motoring public.

Both Congress, in passing the Robinson-Patman Act, and the courts, in interpreting it, have recognized that a wholesaler's success depends in large part upon the success of the retailers to which it sells, and that the competition among retailers is, in practical effect, competition between the wholesalers serving them. On the facts of this case, the jury properly could have found that Signal and Perkins were competitors within the meaning of the Robinson-Patman Act, and the verdict should have been permitted to stand on that ground.

IV.

The Ninth Circuit erred in ruling that the actions of Western Hyway (Signal's subsidiary) and Regal (Western Hyway's subsidiary) were not attributable to Signal because Signal did not exercise its power to control those firms. Whether a parent corporation controls the operations of its subsidiaries is a factual

question, and the record contains evidence from which the jury properly could have inferred that Signal did, in fact, control Western Hyway and Regal to the extent necessary to accomplish Perkins' destruction. For example, both Signal and Standard treated Western Hyway's separate corporate identity as a mere fiction when business reasons made it convenient to do so—treating a competing oil company's offer of a reduced price to Western Hyway as an offer directly to Signal.

The underlying issue on this aspect of the case is whether a favored buyer can immunize a seller who grants price discriminations in its favor from the proscriptions of Section 2(a) through the manipulation and utilization of subsidiaries. With Standard's knowledge of the likely consequences, Signal used Standard's price advantages to support Regal's price cutting activities, causing Perkins' demise. Therefore, Standard should not be able to escape liability for its price discriminations merely because Signal did not exercise in all other respects its power to control the operations of Regal. While the requirement of such extensive exercise of control may be appropriate in assessing liability once a violation has been found for which someone is held responsible, it should not be permitted to enable a corporation to use subsidiaries to circumvent the basic strictures of a statute.

V.

A ruling in favor of petitioner on any of the grounds discussed in Points II, III and IV above would require reinstatement of the jury verdict to the extent that the Ninth Circuit's holding denied recovery for damages attributable to the activities of Regal. In

addition, the Ninth Circuit erred in ruling that certain evidence of the injury suffered by Perkins individually as a result of Standard's discriminations was improperly considered by the jury as an element of damages.

This Court consistently has recognized that, while a jury's award in a treble damage action cannot be based upon speculation or conjecture, an appellate court should not set aside a damage award predicated upon data which allows the jury, as a matter of reasonable inference, to assess the probable loss inflicted by the antitrust violation. The record below contained substantial evidence upon which the jury could have predicated a reasonable assessment of the damages incurred by Perkins.

Perkins' evidence of lost brokerage and rental income, criticized by the Ninth Circuit, was introduced in an attempt to provide a full picture of the legal injury incurred by Clyde Perkins individually as a result of Standard's discriminatory conduct. And this Court has long recognized the distinction between the fact of damage—legal injury—and the extent of damages in private antitrust cases. Moreover, that evidence was not presented to the jury for damage calculation purposes. The trial court specifically delineated the elements which the jury could consider in assessing damages and never once referred in its charge to the evidence cited by the court of appeals. Therefore, the evidence referred to by the Ninth Circuit could not have been involved in the jury's award of damages to Clyde Perkins individually.

ARGUMENT

I.

INTRODUCTION

A. Petitioner Clyde A. Perkins, starting in 1928 as the operator of a single service station, by 1955 had become one of the largest independent gasoline wholesalers and retailers servicing the Pacific Northwest market. Perkins was driven out of business when Standard—for a period of two and one-half years, from March 1955 until the end of 1957—sold gasoline at discriminatorily lower prices to a large competing wholesaler (Signal Oil & Gas Company) and retail competitors (Standard's Branded Dealers), and also provided his competitors with discriminatory services, facilities and payments. The jury, after a long trial and two days of deliberations, found that Standard's price and price-related discriminations against Perkins had violated Sections 2(a), 2(d) and 2(e) of the amended Clayton Act, and it awarded him over $330,000 in actual damages.

The Ninth Circuit set aside the entire jury verdict. So far as the Branded Dealers were concerned, the court apparently agreed that the jury properly could have found that Standard's price discriminations in their favor violated Section 2(a), and it ruled that, as to the price-related discriminations, "[n]either did the [district] court err in submitting to the jury Perkins' claims based upon Standard's alleged Section 2(d) and

2(e) violations" (A. 107, 111).[23] However, considering Standard's price discriminations in favor of Signal, the court ruled as a matter of law that they were immune from challenge under Section 2(a) of the Clayton Act, insofar as some of Perkins' damages resulting therefrom were attributable to activities of Regal. Therefore, the entire verdict was deemed tainted and was set aside (A. 108-09).

In reaching that result, the court made no mention of the Act's pupose to prevent large buyers from gaining discriminatory price advantages over their smaller rivals, making them begin the competitive struggle from behind. Nor did the court assign any weight to the fact that Standard's price discriminations had caused a substantial lessening of competition in the Pacific Northwest wholesale and retail gasoline markets, driving out of business one of the area's largest independents. Rather, impressed with the form of the transaction, the court ruled that the verdict in favor of Perkins must be set aside solely because one of the favored purchasers (Signal) did not resell the gasoline directly to its retail customers (Regal), but instead resold to one of its subsidiaries (Western Hyway) which,

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[23] The principal substantive portion of the Ninth Circuit's opinion dealing with Perkins' claim involving Standard's Branded Dealers reads as follows in its entirety (A. 107):

> "The Branded Dealers purchased gasoline and oil from Standard which they in turn sold at retail. With respect to them, Perkins' story is quickly told. Because of Standard's favoritism and discrimination they were able to and did offer lower prices and better services and facilities than Perkins in marketing at retail."

in turn, resold to one of its subsidiaries, the Regal retail outlets. The court reasoned that—

> "Section 2(a) of the Act does not recognize a causal connection, essential to liability, between a supplier's price discrimination and the trade practices of a customer as far removed on the distributive ladder as Regal was from Standard." [A. 116.]

The decision of the Ninth Circuit exalts form at the expense of economic reality and, contrary to the purpose of the Clayton Act, imposes an artificial limitation on the power of Section 2(a) to prevent price discriminations which tend "substantially to lessen competition . . . in any line of commerce." Moreover, by basing that limitation exclusively on the number of persons in the distributive chain established by the favored purchaser, the decision, unless reversed, will enable large, powerful buyers virtually to insure statutory immunity to suppliers which grant them favorable price concessions. The ease with which the court's ruling could be utilized to subvert the purposes of Section 2(a) is well illustrated by the facts of this case where both companies in Signal's chain of distribution were part of the Signal corporate family.[24]

If Section 2 of the Clayton Act is to perform its primary function of enabling all rivals to enter into competition on relatively equal terms, it is critically important that large buyers (and sellers) be denied this

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[24] Operation through subsidiaries is common in the petroleum industry (Tr. 3169, 4780, 4954). Standard presently has over 100 subsidiaries; Signal has more than 45. Moody's *Industrial Manual*, pp. 2126-27, 2496-98 (July 1968).

easy means of avoiding its impact.[25] This is particularly true in the petroleum industry where the independents have long been in weak competitive positions and are constantly losing more ground to the majors. See generally, The Federal Trade Commission's *Report on Anticompetitive Practices in the Marketing of Gasoline* (June 1967). As Chairman Dixon of the Commission has colorfully characterized the problem—

> "the 'independent'—including the independent refiner, the independent jobber, and the independent retailer—has, as the saying goes, one foot in the grave and the other on a banana peel.". [Quoted in Wilson, *Recent Developments Affecting Independent Businessmen in the Oil Industry,* 9 Antit. Bull. 559, 562 (1964).]

B. Section 2(a) of the Clayton Act as it presently stands is a composite of two statutory enactments. The first, Section 2 of the 1914 Clayton Act, prohibits price discriminations whose effect may be "substantially to lessen competition . . . in any line of commerce." 38 Stat. 730. The second enactment, the 1936 Robinson-Patman amendments to the original Section 2, left intact the above quoted standard of

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[25] See, in this connection, *Stanton* v. *Texaco, Inc.,* 1968 Trade Cases ¶ 72,595 (D.R.I. 1968), where the defendant argued, on motion for summary judgment, that the plaintiff-retailer's complaint, which alleged that Texaco had unlawfully discriminated against it by granting a lower price to competing retailers, should be dismissed because the defendant's gasoline, before being distributed to the competing retailers, was first sold to a wholesaler. The court denied the motion, stating, among other things, that the relationship between Texaco and its wholesaler should be explored at trial. (*Id.,* at pp. 86,077-78.)

illegality. 49 Stat. 1526.[26] The Robinson-Patman amendments altered the original Section 2 in ways not relevant here, and, in addition, added to the statute another substantive standard of illegality, prohibiting price discriminations which injure, destroy or prevent competition with the discriminating supplier (primary line injury), the favored purchaser (secondary line), and the customer of the favored purchaser (tertiary line).

We demonstrate below that the Ninth Circuit's decision is erroneous both under the original Section 2 standard (Point II, pp. 36-58, *infra*) and the Robinson-Patman amendments (Points III and IV, pp. 58-68, *infra*). Each of these three points constitutes a sufficient independent basis for upholding the jury verdict. And it has long been settled that an appellate court should not set aside a jury verdict if there is substantial evidence to support any legally cognizable claim submitted to the jury. *E.g., Cross* v. *Ryan,* 124 F. 2d 883, 887 (7th Cir.), *cert. denied,* 316 U.S. 682 (1942).

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[26] The Robinson-Patman Act merely changed a split infinitive ("to substantially lessen") in the original Section 2 language into the present wording ("substantially to lessen"). 49 Stat. 1526.

II.

THE JURY PROPERLY COULD HAVE RETURNED A VERDICT AGAINST STANDARD ON THE GROUND THAT THE EFFECT OF ITS PRICE DISCRIMINATIONS IN FAVOR OF SIGNAL MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN THE PACIFIC NORTHWEST WHOLESALE AND RETAIL GASOLINE MARKET.

Any price discrimination covered by Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[27] is prohibited if its effect may be—

> "[*a*] substantially to lessen competition or to tend to create a monopoly in any line of commerce
>
> or
>
> "[*b*] to injure, destroy, or prevent competition with any person
>
> > "[1] who either grants or
> >
> > "[2] knowingly receives the benefit of such discrimination, or
> >
> > "[3] with customers of either of them."

The statute thus contains two distinct and independent tests of illegality. The first, [*a*] above, the original Section 2 standard which has been part of the Clayton Act since its passage in 1914, focuses on the overall "line of commerce" in which the competitive injury is felt. The second, [*b*] above, the 1936 Robinson-Patman amendments, focuses on the specific competitors injured by the price discrimination. See generally, Edwards, *The Price Discrimination Law* 5-13 (1959);

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[27] There are no questions in this case that both Perkins and Signal were "purchasers" from Standard; that they purchased gasoline "of like grade and quality"; and that the pertinent transactions occurred "in commerce" (A. 42-44).

Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 1-11 (1959).

The Ninth Circuit, in the decision below, completely ignored the original Clayton Act standard;[28] it discussed only the language of the Robinson-Patman amendments. The district court, on the other hand, had correctly charged the jury that it could return a verdict against Standard if it found that the effect of Standard's price discriminations "may have been to substantially lessen competition . . . in any line of commerce. . ." (*e.g.*, A. 53-54).[29] The court of appeals erred in failing to uphold the jury verdict on that ground.

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[28] Indeed, Section 2(a) as set forth in the court's opinion omitted entirely the "in any line of commerce" language (see A. 107 fn. 3).

[29] Both Perkins and Standard, in their requested instructions, covered the question whether Standard's price discriminations had violated the original Section 2 standard. Thus, Standard proposed the following charge:

> "In order for plaintiff Clyde Perkins to prove that defendant Standard has discriminated in price in violation of Section 2(a) of the Clayton Act, he must prove not only that Standard sold gasoline of the same type to different purchasers at different prices but further that the effect of these price differences *may have been to substantially lessen competition or to tend to create a monopoly in any line of commerce* or to injure, destroy or prevent competition with Standard or with the favored purchaser from Standard, or with the customers of either of them." [Defendant's Requested Instructions, No. 51, emphasis added.]

To the same effect is Plaintiff's Proposed Instructions, No. 7.

A. SECTION 2(a) OF THE CLAYTON ACT PROHIBITS ALL PRICE DISCRIMINATIONS WHOSE EFFECT MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN A COMMERCIALLY SIGNIFICANT PRODUCT AND GEOGRAPHIC MARKET, REGARDLESS OF THE FUNCTIONAL LEVEL AT WHICH THE ANTICOMPETITIVE IMPACT IS FIRST FELT.

(1) The Van Camp Decision and the Plain Meaning of the "In Any Line of Commerce" Language of Section 2(a)

While the Court has never decided this precise issue, its ruling in *George Van Camp & Sons Co.* v. *American Can Co.,* 278 U.S. 245 (1929), rendered prior to the Robinson-Patman amendments, strongly supports the jury verdict against Standard. In *Van Camp,* a purchaser from the defendant sued to enjoin price discriminations against it in violation of the original Section 2 of the Clayton Act. The defendant argued that its price discriminations could not be challenged by a purchaser because the statutory words "in any line of commerce" "must be confined to the particular line of commerce in which the discriminator is engaged, and that they do not include a different line of commerce in which purchasers from the discriminator are engaged in competition with one another." 278 U.S., at 253.

This Court flatly rejected that argument, ruling that the action came—

> "within the terms of the statute, unless the words 'in any line of commerce' are to be given a narrower meaning than a literal reading of them conveys. The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." [*Ibid.*, emphasis in original.]

Continuing, the Court observed that adoption of the defendant's argument would lead to a result at variance with "[t]he fundamental policy of the legislation"—

> "that, *in respect of persons engaged in the same line of interstate commerce, competition is desirable and that whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil.* Offense against this policy, by a discrimination in prices exacted by the seller from different purchasers of similar goods, is no less clear when it produces the evil in respect of the line of commerce in which they are engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged. In either case, a restraint is put upon 'the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain.'" [*Id.*, at 254, emphasis added.]

The thrust of *Van Camp* is clear. The phrase "in any line of commerce" means what it says: that a price discrimination is unlawful if it tends to cause substantial competitive harm in any commercially meaningful product and geographic market—in any one of the many " 'channels of interstate trade' " (*id.*, at 254)—regardless of the functional level or point in the favored purchaser's chain of distribution at which that harm is first felt.

The broad language of *Van Camp* itself demonstrates that the Court was not limiting its holding to the precise facts of the case before it, *i.e.*, that the original Section 2 prevents a lessening of the competition faced by the discriminator's favored purchaser—competition which, in the subsequent Robinson-Patman lexicon, has become known as second line. The Court's treatment

of the authorities relied upon by the defendant confirms the comprehensive scope of its decision.

In the *Van Camp* opinion the Court addressed itself to the contention that defendant's proposed reading of the statute had been adopted by the Second Circuit in *Mennen Co. v. Federal Trade Commission,* 288 Fed. 774, *cert. denied,* 262 U.S. 759 (1923). Refusing to adopt the defendant's contention the Court categorically rejected as "unsound" the *Mennen* analysis (278 U.S., at 254):

> "The decision in that case was based upon the premise that the statute was ambiguous and required the aid of committee reports, etc., to determine its meaning, a premise which we have rejected as unsound."

Had the Court in *Van Camp* rendered a more narrow decision than the language of its opinion would indicate—a decision limited to so-called second line competitive injury—it easily could have distinguished *Mennen* on the facts and need not have categorically repudiated it. For *Mennen* was what has come to be known as a third line case, one involving sales at discriminatorily lower prices to wholesalers than to direct-buying retailers who competed with the retail customers of the favored wholesalers.[30]

This Court's treatment of *Mennen,* read in conjunction with the unequivocal language of its opinion,

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[30] "What the Mennen Company has done was to allow 'wholesalers' who purchased a fixed quantity of their products a certain rate of discounts, while to the 'retailers' who purchased the same quantities it denied the discount rates allowed to the 'wholesalers' " (288 Fed., at 779).

can only mean that the Court was rejecting, in the broadest possible terms, the concept that the competition protected by the original Section 2 is restricted to competition occurring at any predetermined point in the favored puchaser's chain of distribution. As two eminent commentators on price discrimination problems have observed in analyzing *Van Camp,* "[s]ubsequent to this decision the statute applied to all discriminations that had the prohibited anticompetitive effect, no matter where that effect became apparent" (Edwards, *The Price Discrimination Law* 7 (1959)); for, "[i]n using the term 'line of commerce' Congress evidently was referring *to lines of goods rather than levels of competition*" (Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 7 (1959) (emphasis added)).[31]

(2) The Parallel Judicial Interpretation of the Same Language in Sections 3 and 7 of the Clayton Act

The above interpretation of the "in any line of commerce" language not only accords with the objectives of Section 2 of the Clayton Act as articulated in *Van Camp, supra;* it also is consistent with the uniform judicial interpretation of the same language in Section

[31] To the same effect are the pre-Robinson-Patman Act cases and Federal Trade Commission opinions which analyze price discriminations challenged under the original Section 2 without any mention of functional levels of competition. *E.g., Sidney Morris & Co.* v. *National Ass'n of Stationers,* 40 F. 2d 620 (7th Cir. 1930); *Porto Rican American Tobacco Co.* v. *American Tobacco Co.,* 30 F. 2d 234 (2d Cir.), *cert. denied,* 279 U.S. 858 (1929); *Pittsburgh Coal Co.,* 8 F.T.C. 480, 514 (1925); *South Bend Bait Co.,* 4 F.T.C. 355, 360 (1922).

3 and Section 7 of the Act,[32] as the legislative history of the Act and the 1950 amendments thereto indicate Congress intended. Indeed, in the landmark decision in the *duPont-General Motors* case, *United States* v. *duPont & Co.*, 353 U.S. 586 (1957), this Court expressly relied upon *Van Camp* as support for its ruling that appraisal of the pertinent line of commerce in a Section 7 merger action cannot be limited by *a priori* rules of inclusion and exclusion.

The Court in *duPont* was writing on a relatively clean slate insofar as Section 7 itself was concerned. In ascertaining the meaning of that Section, it looked to the standards developed in previous decisions under Sections 2 and 3 of the Act. Hence, in determining the definitional standard for the relevant market in which to appraise the anticompetitive impact of the stock acquisition there involved, the Court noted (353 U.S., at 593) that the "threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition,'" quoting *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299 fn. 5 (1949), a Section 3 case.

Further, considering whether the relevant area of effective competition had to include duPont's sales of finishes and fabrics for all uses (including automotive

[32] Section 3, 15 U.S.C. § 14, prohibits tying, exclusive dealing and other arrangements whose "effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 7, 15 U.S.C. § 18, prohibits any acquisition "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

uses), the Court quoted *Van Camp, supra*, 278 U.S., at 253, to the effect that—

> "if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." [*Id.*, at 594 fn. 13.]

And it went on to hold that economic realities limited the relevant market to fabrics and finishes sold for automotive uses. *Id.*, at 594-95. Finally, employing the same approach in interpreting the meaning of Section 7's standard of illegality, the Court noted (*id.*, at 595) that "[t]he market affected must be substantial," and it must be shown that "competition may be 'foreclosed in a substantial share of . . . [that market],'" again relying upon *Standard Oil, supra*, 337 U.S., at 314, and an earlier Section 3 case, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 357 (1922).

Six years after the *duPont* decision, in *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), the Court undertook to establish a test of *prima facie* illegality for Section 7 actions. Faced again with a relatively clean slate under that Section, the Court once more turned to Section 3 cases for guidance. And it emphasized that the House Report on the 1950 Celler-Kefauver amendments to Section 7 had stated (374 U.S., at 365)—

> "that the tests of illegality under amended § 7 'are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.' H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Accordingly, we have relied upon decisions under these other sections in applying § 7. See *Brown Shoe Co.* v. *United States*, [370 U.S. 294]; cf.

> *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 595, and n. 15[;] . . . *Standard Oil Co.* v. *United States,* 337 U.S. 293, cited in S. Rep. No. 1775, 81st Cong., 2d Sess. 6. . . ."

The House and Senate Reports cited in the above quotation from *Philadelphia Nat'l Bank* echo the sentiments of the 1914 Congress which passed the original Clayton Act. For example, Representative Floyd of Arkansas declared that in conference the "line of commerce" language had been inserted in all three sections of the bill to make them "in harmony now .... the same principle being applied to each one of them" (51 Cong. Rec. 16318) (1914)).

It is important to stress, finally, that the sole purpose of defining a line of commerce is to provide a commercially meaningful context for appraisal of the anticompetitive impact of the various activities covered by the Clayton Act. As this Court ruled in a recent Section 7 case, *United States* v. *Continental Can Co.,* 378 U.S. 441, 457 (1964):

> "Since the purpose of delineating a line of commerce is to provide an adequate basis for measuring the effects of a given acquisition, *its contours must, as nearly as possible, conform to competitive reality."* [Emphasis added.]

That formulation comports with the reasoning in an earlier action under Section 3, *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961):

> "*First,* the line of commerce, i.e., the type of goods, wares, or merchandise, etc., involved must be determined. . . . *Second*, the area of effective competition in the known line of commerce must be

charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected." [Emphasis in original.]

Commercial realities rather than arbitrary functional levels also should be the standard under Section 2.

In sum, the decision below improperly limits the coverage of Section 2(a), excluding from its reach price discriminations whose demonstrably anticompetitive effects do not occur above a predetermined point in the favored purchaser's chain of distribution. Nothing in the original Section 2 language supports such a restrictive interpretation. On the contrary, effectuation of the Act's broad remedial purpose requires, in this case no less than in *Van Camp* and the other decisions of the Court discussed above, that the "in any line of commerce" language be defined to prohibit a lessening of competition in any commercially significant product and geographic market—regardless of whether the favored purchaser is able to structure its distribution system so that the most direct and immediate competitive injury occurs two persons below it. While such evidence may be pertinent in determining whether, *as a matter of fact*, the competitive injury was caused by the price discrimination, it should not be permitted to exonerate from liability, *as a matter of law*, a supplier such as Standard whose price discriminations have been proved to cause the requisite competitive injury.

B. THE EVIDENCE BEFORE THE JURY PROVED THAT THE WHOLESALE AND RETAIL SELLING OF GASOLINE IN THE PACIFIC NORTHWEST WAS A PROPER LINE OF COMMERCE IN WHICH TO APPRAISE THE IMPACT OF STANDARD'S PRICE DISCRIMINATIONS, AND THAT THE EFFECT OF THOSE DISCRIMINATIONS WAS SUBSTANTIALLY TO LESSEN COMPETITION.

(1) The Pacific Northwest Gasoline Market

On the facts of this case there can be no question that the jury properly could have concluded that the retailing and wholesaling of gasoline in the Pacific Northwest was a commercially significant line of commerce in which it was appropriate to test the anticompetitive impact of Standard's price discriminations. The Pacific Northwest States of Washington and Oregon were the only States in which Perkins could do business under his contract with Standard (Ex. 2, 102, A. 493, 549, 558).[33] See *Standard Oil Co.* v. *Perkins*, 347 F. 2d 379, 381 (9th Cir. 1965). And Perkins was required to buy the vast bulk, if not all, of his gasoline requirements from Standard (Ex. 2, A. 493-94; Ex. 3). *Cf. Perkins* v. *Standard Oil Co.*, 235 Ore. 7, 383 P. 2d 107, 111, *mot. for clarification denied*, 383 P. 2d 1002 (1963).[34]

Both Signal and Perkins lifted all the gasoline they marketed in the Pacific Northwest from Standard's Pacific Northwest terminals, principally Willbridge in Portland, with Signal drawing also from Point Wells in Seattle (A. 203; Ex. 280B-1). The Chevron and

[33] Indeed, Perkins' authorized area comprised only part of those States, covering less than one-third of their area (Ex. 1449, A. 587). See the map delineating Perkins' authorized area, reproduced as Appendix B to this brief, p. 80, *infra*.

[34] Each case cited in the text involved an action by Perkins against Standard for breach of contract. The Ninth Circuit affirmed a jury verdict in Perkins' favor. The Oregon case was subsequently settled.

Signal dealers in whose favor Standard made price and price-related discriminations against Perkins likewise were served out of Willbridge (Tr. 1275-76; A. 297). And, as the Ninth Circuit observed, the deadly price war against Perkins was started by Regal in Portland and "it precipitated and sustained a sort of chain reaction throughout Perkins' entire marketing area . . ." (A. 108-09 and fn. 6). Moreover, there is no evidence that the price war affected areas beyond the borders of Washington and Oregon.

The Pacific Northwest clearly was the broadest area of effective competition in which the anticompetitive impact of Standard's discriminatory pricing policy could reasonably be appraised. Perkins could not, as a practical matter, obtain his gasoline requirements from outside that area, and he could sell Standard's products only within that area (see the Statement, pp. 5-7, 11-12, *supra*). The Pacific Northwest, in short, was "the market affected" by Standard's price discriminations. See *Tampa Electric, supra*, 365 U.S., at 327; *Standard Oil Co.* v. *United States, supra*, 337 U.S. at 299 fn. 5.

(2) The Lessening of Competition in That Market Caused by Standard's Price Discriminations

The jury likewise could properly have concluded that competition was substantially lessened in the Pacific Northwest when one of the area's largest independent gasoline wholesale and retail dealers was driven out of business and supplanted by a major. This is particularly true since the price discriminations which caused the independent's demise were granted by Standard—the most powerful supplier in the Pacific Northwest, furnishing nearly 30 percent of the area's gasoline gallonage (A. 373); the price discriminations were continued for over 2½ years until Perkins went out of

business; they were granted in circumstances where Standard had every reason to know that Signal would pass along to Regal those discriminatory price advantages in order to injure Perkins; and they were continued long after Perkins had complained that Standard's discriminations against him were causing his ruin.

Petitioner, by the mid-1950's, was purchasing from Standard and subsequently marketing to the motoring public about 8% of all the gasoline distributed by Standard in the Pacific Northwest (Tr. 1626; A. 373-74; Ex. 5, 6). During the period from March 6, 1955, through December 1, 1957, he sold approximately 20 million gallons of gasoline (Ex. 82F, A. 533). His business volume was substantial under any standard. See *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947).

The jury also had before it substantial qualitative evidence that Perkins' elimination from the market tended substantially to lessen competition. First, the Pacific Northwest gasoline market is dominated by the majors, and the position of the independents has been declining (see the Statement, pp. 11-12, *supra*). Perkins' elimination sharply accelerated that decline.

Secondly, petitioner was not just one of a multitude of small businessmen operating in the affected line of commerce. He was one of the largest independent gasoline wholesalers and retailers in the Pacific Northwest—having a 2.4% market share.[85]

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[85] The significance of Perkins' loss in the market he serviced would be roughly comparable to the elimination of Sun Oil Company from the national scene, where Sun enjoyed a 2.5% market share in 1964. See *The Oil & Gas Journal*, February 8, 1965, pp. 50-51, as tabulated in Prewitt, *Reply to Professor Dixon's Comment on the Federal Trade Commission's Report on Gasoline Marketing*, 13 Antit. Bull. 1383, 1394 (1968).

Thirdly, the testimony of Perkins' expert witness (Dr. Vernon A. Mund) emphasized that Pacific Northwest consumers are likely to face "higher prices" as a result of the declining position of the independents. As Dr. Mund stated in response to the following hypothetical question, which was premised on facts set forth in the Statement, *supra:*

> "Q [by petitioner's counsel] Taking the period of 1955 through 1957 and assuming the existence of price leadership, as you have defined it in the marketing of gasoline and other petroleum products in the West Coast; and assuming a non-open market for such products as you define the term to us; and assuming a decline of independent jobbers in the industry, that is, the West Coast industry, and assuming a constant upward trend in the West Coast tank wagon price, that is, the price charged to retailers, do you have an opinion as to the economic condition of that market?
>
> * * * * * *
>
> "A My opinion is under the conditions sketched by you, the trend would be toward increased concentration and an increase in oligopoly and a continued decline of small business with the tendency for the consumer, or the owners to face prospective higher prices." [A. 359-60.]

The critical importance of low prices to consumers was documented in the record by, *inter alia,* the fact that truckers changed their purchasing habits during the price war to buy as much as possible in price-depressed areas (Tr. 691-93, 1228-29; A. 254).

Fourthly, Standard—the discriminator—was the single most powerful supplier in the market, and it discriminated in price against Perkins in circumstances where it had every reason to foresee the anticompeti-

tive effect of its actions (see the Statement, pp. 18-20, *supra*). Perkins' inability to survive Standard's discriminatory conduct—and Standard's obvious ability and determination to keep up the pressure until the foreseeable end came to pass—is a sure sign to the remaining smaller Pacific Northwest independents that they live at the sufferance of the majors. The likely effect will be to lessen their zeal for hard price competition, to the detriment of the public. Moreover, the record contains evidence that the substantial price discriminations involved here could not have been continued for two and one-half years unless market conditions already were anticompetitive. As Dr. Mund observed (A. 353)—

> "price discrimination as a business practice can arise and exist only under conditions of some degree of monopoly power. In other words, the conclusion is that price discrimination and monopoly are Siamese twins."

And, finally, the record contains evidence from which the jury could have found that Standard was likely to continue in the future to favor Signal *vis-a-vis* its competitors so long as Standard was dependent on Signal's crude oil supply (see the Statement, pp. 8-9, *supra*). As the official in charge of the Standard subsidiary (Signal Oil Company) which operated the Signal Branded Dealer stations testified (A. 418):

> "[W]hen I was made president of the Signal Oil Company . . . Mr. Sawyer . . . and I were both instructed by Mr. Peterson [President of Standard] that while we were certainly to do a good job in running the Signal Oil Company that we had just acquired, *our main job was to maintain good relations with the Signal Oil and Gas people so that we would under no circumstances jeopardize*

that supply of crude oil. We had to have it or we could not have met our commitments." [Emphasis added.]

Considering these facts, the jury surely could have concluded not only that a substantial lessening of competition was threatened, but that competition in fact had already been substantially lessened. This is particularly true in light of the critical consideration that if Standard could, without legal liability, utilize price discriminations to drive Perkins—one of the largest area independents—out of business, the majors could go on to eliminate virtually every other remaining independent without fear of liability. In *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207, 213 (1959), the Court observed, in relation to the potential destruction of a much less substantial operation than Perkins' enterprise, that anticompetitive practices are—

> "not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups."

It has long been settled, in any event, that *de facto* impairment of competition is not an element of a Clayton Act violation. As this Court has ruled in a Section 3 context:

> "Under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement." [*International Salt, supra,* 332 U.S., at 396.]

The movement in the Pacific Northwest gasoline market was clearly directed by Standard's price discriminations toward a substantial diminution in the vigor of competition.

The reasonableness of the jury's conclusion that Standard's price discriminations were unlawful is corroborated by the findings of the Federal Trade Commission in its *Report on Anticompetitive Practices in the Marketing of Gasoline* (June 1967). The Commission, analyzing the differences between the majors and the independents, stated that while the "major prefers not to engage in price competition" (pp. 11, 12)[36]—

> "[*i*]*ndependents seek market share primarily through a price appeal*. Their competitive strategy is to compensate for the majors' usual edge in the number and preferred location of stations within a market, and the majors' expenditures for advertising and customer services such as credit cards and touring assistance, through the maintenance of a price differential." [Emphasis added.]

The Commission went on to observe that (pp. 39-40)—

> "[t]he record is clear that independent refiners and marketers exert a beneficial influence upon competition that is disproportionate to their actual representation within the petroleum industry: they have long been innovators of marketing methods and have been the primary agents in translating efficiencies at the production and distribution levels into lower prices at the retail level.

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[36] Continuing, the Commission explained as follows (p. 11): "The total demand for gasoline is highly inelastic, while the demand for branded gasoline is highly elastic depending on price. In such a situation, price competition among the leading sellers can only be detrimental to each member of the class. Price reductions would be followed by sellers of equal size and would not be accompanied by compensating increases in total demand."

> They play a part in the industrial pattern that is 'entirely disproportionate' to their size 'in keeping markets competitive, flexible, and dynamic and in preventing a recognition of interdependence and the possible bureaucratic conservatism that go with size and quasipermanent life from stultifying competition." [Quoting from De Chazeau & Kahn, *Integration and Competition in the Petroleum Industry* 383 (1959).]

Price wars, such as the one involved here, constitute the most serious threat to the continued viability of the independents, for, in the view of the Commission, "[b]ecause of industry structure, a continuous pattern of price wars in which the larger firms employ coercive or discriminatory pricing practices could permanently stabilize price among entities engaged in the marketing of gasoline" (pp. 38-39). And, as Dr. Mund testified before the jury, those prices would in all likelihood be stabilized at higher levels (A. 359-60).

Standard contends that the jury could not reasonably find on the record below that its long-sustained price discriminations in favor of Signal caused any lessening of competition (Br. in Opp. 11). It bases this contention on an argumentative assertion that its discriminatory price advantages were not passed on by Signal and a characterization of its price discriminations as "small" and "negligible" (Br. in Opp. 3, 11).[37] The short answer to the latter point is that the adjectives

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[37] Standard cites Ex. 1550, for example, as authority for the allegation that its price discriminations in favor of Signal amounted to very little per gallon (Br. in Opp. 4 fn. 4). Perkins presented evidence to the contrary (see Ex. 93 I, M, and N, A. 546, 547), and the jury presumably believed Perkins' evidence that Standard's exhibit excluded from its computations pertinent items such as freight, "temporary" adjustments and major brand designations.

"small" and "negligible" are, to say the least, hardly a fair description of Standard's rebates to Signal of more than $1 million, a substantial portion of which was directly allocable to Signal's purchases in the Pacific Northwest (see Ex. 23C; p. 13, fn. 16, *supra*). As to passing on, the record contains substantial evidence that Regal obtained the benefits of the price advantages in favor of Signal. Thus, at least one Standard executive recognized that Regal had " 'a better price' " than Perkins in the Pacific Northwest (A. 189). In addition, since Regal was part of Signal's corporate family, subject to Signal's power of control (A. 109 fn. 6), a direct pass-through of Standard's price advantages was not a necessary element of a finding that those advantages supported and thus caused the deadly price war against Perkins.

Beyond this, the questions whether Standard discriminated in price against Perkins and, if so, in what amount, and whether Signal passed on to Regal its price advantages, and whether those price advantages caused the destruction of Perkins' business, all were questions of fact properly submitted to the jury and resolved in favor of petitioner. The jury found that Standard's discriminations had caused substantial injury to Perkins' business, and the Ninth Circuit affirmed the jury's findings in this regard (A. 108-09 fn. 6). Those findings should stand.

C. THE ROBINSON-PATMAN AMENDMENTS TO SECTION 2 OF THE CLAYTON ACT DID NOT ALTER THE ORIGINAL SECTION 2 PROHIBITION OF PRICE DISCRIMINATIONS CAUSING A SUBSTANTIAL LESSENING OF COMPETITION IN ANY COMMERCIALLY SIGNIFICANT MARKET.

The 1936 Robinson-Patman amendments to Section 2 of the Clayton Act, relied upon by the Ninth Circuit (A. 108 and fn. 5), do not provide a rationale for the court's setting aside of the jury verdict. On the contrary, they lend strong support to our argument, for they were clearly intended by Congress to supplement, but not supplant, the original Section 2 provision.

The Robinson-Patman amendments provide that any price discrimination covered thereby is unlawful if it injures, destroys or prevents competition with the discriminating supplier, the favored purchaser or the customer of either (see [*b*], p. 36, *supra*). The amendments "were motivated principally by congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores. However, *the legislative history of these amendments leaves no doubt that Congress was intent upon strengthening the Clayton Act provisions, not weakening them.* . . ." *Cf. FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543-44 (1960) (fn. omitted) (emphasis added). Congress sought to achieve this strengthening by lowering the standard of proof of a violation in certain circumstances. As the Report of the Senate Judiciary Committee (S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)) emphasized, the original Section 2 of the Clayton Act had—

> "in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the

more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower."

That sentiment was echoed in H. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

The same point was made on the House floor by Representative Utterback (80 Cong. Rec. 9417 (1936) (emphasis added)):

> "The discriminations prohibited by this bill are those whose effect may be:
>
> "1. Substantially to lessen competition in any line of commerce; or,
>
> "2. To tend to create a monopoly in any line of commerce; or
>
> "3. To injure, destroy, or prevent competition:
>
> "(a) With any person who either grants or knowingly receives the benefit of such discrimination; or
>
> "(b) With customers of either of them (i.e., the grantor or grantee).
>
> "*Effects Nos. 1 and 2 above correspond to those required to be shown under the old section 2 of the Clayton Act.* Generally speaking, they require a showing of effect upon competitive conditions generally in the line of commerce and market territory concerned, as distinguished from the effect of the discrimination upon immediate competition with the grantor or grantee."

Thus, under the Robinson-Patman amendments a violation may be premised upon proof of substantial injury to specific competitors of the favored purchaser

or its customers (see Point III, pp. 58-62, *infra*). Where such second or third line injury is present, no substantial lessening of competition in an overall "line of commerce" need be shown. *E.g., FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948); *Foremost Dairies, Inc.* v. *FTC*, 348 F. 2d 674, 678 (5th Cir. 1965). For this reason, most Section 2 actions have since been brought under the Robinson-Patman amendments.[38]

Nothing in the language of those amendments, their legislative history and subsequent enforcement policy, however, justifies the Ninth Circuit's holding that petitioner's proof, which satisfied the stricter standard of the original Section 2, provides no basis for the jury verdict. Congress manifestly did not intend its loophole closing amendments to convolute the entire statutory scheme, in effect reading out of the Act the original Section 2 provision and precluding all causes of action premised thereon.

Indeed, by leaving untouched the original Section 2 language, Congress negated that possibility. The amendments specifically cover primary line, secondary line and tertiary line injury. It is essential, therefore, that injury not occurring at those levels be cognizable under the original prohibition of price discriminations which may tend substantially to lessen competition "in any line of commerce," or else that language will be mere surplusage, having exactly the same scope as the Robinson-Patman amendments but imposing a greater

[38] "There is . . . no incentive for the Commission to distinguish sharply between the two kinds of injury nor for the respondents to insist on such a distinction. Whatever type of injury can be most conveniently proved is likely to become the basis of the Commission's case. Since a showing of injury to a class of competitors is usually easier than a showing of injury to competition in the market, efficiency and economy in law enforcement suggest emphasis on the narrow concept rather than the broad one." Edwards, *The Price Discrimination Law* 540 (1959).

burden of proof. Such a result not only would be contrary to the plain intendment of the amendments, it would violate the cardinal rule of statutory construction that, when possible, all words in a statute must be given a reasonable and meaningful interpretation. See, *e.g., Ex Parte Public Nat'l Bank*, 278 U.S. 101, 104 (1928).

III.

THE JURY PROPERLY COULD HAVE RETURNED A VERDICT AGAINST STANDARD ON THE GROUND THAT ITS PRICE DISCRIMINATIONS AGAINST PERKINS INJURED, DESTROYED OR PREVENTED COMPETITION WITH THE FAVORED PURCHASER, SIGNAL, PERKINS' COMPETITOR ON THE WHOLESALE LEVEL.

Independent of the Ninth Circuit's error in holding that Section 2 of the Clayton Act has no applicability in so-called fourth line cases (discussed in Point II above), the court fundamentally misconceived the nature of this case in ruling that it involved fourth line injury. The district court submitted to the jury the question whether Standard's favored purchaser, Signal, and its disfavored purchaser, Perkins, were competitors.[39] The jury properly could have found that

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[39] The trial judge charged the jury that Perkins claimed he was injured by having to buy from Standard—

> "at higher prices than the prices charged by Standard to *plaintiff's competitors* with respect to gasoline both on regular and premium grade.
>
> "*The particular competitors concerned are Signal Oil and Gas Company* and Chevron dealers and Signal dealers. . . ." [A. 44, emphasis added.]

Continuing, the judge noted that one of the essential elements of this aspect of Perkins' claim was proof "that Standard sold gasoline to Clyde Perkins at higher prices than the prices charged by Standard on reasonably contemporaneous sales of gasoline of the same type *to competitors*" (A. 49, emphasis added). And, in a reiteration of the above charge, the judge added the words "of plaintiff" after "competitors" (A. 50).

they were competitors because the uncontroverted evidence established that each purchased gasoline directly from Standard; each wholesaled that gasoline in the Pacific Northwest; and the retailers served by each actively competed for the patronage of the motoring public. See the Statement, pp. 5-7, 10, *supra*. And there can be no doubt that a price discrimination which causes the destruction of a competitor of the favored purchaser "injure[s], destroy[s], or prevent[s] competition with any person . . . receiv[ing] the benefit of such discrimination . . ." within the meaning of the Robinson-Patman amendments to the Clayton Act. The facts of the instant case therefore provide an example of second line injury cognizable under those amendments.

It is of course true that a more traditional second line injury case would involve price discriminations between wholesalers which compete for sales to the same retailers. But the scope of the Robinson-Patman Act is not limited to such situations. Indeed, one of the paramount concerns of Congress, manifested throughout the legislative history, was that large direct-buying retailers should not be able to obtain from their suppliers better prices than wholesalers serving the competitors of the direct-buying retailers. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 43, 49 (1948). This fact demonstrates a congressional recognition that the favored and disfavored purchasers need not directly vie for the trade of anyone in order for price discriminations between them to be actionable under the Robinson-Patman amendments.

The courts and the Federal Trade Commission consistently have followed the congressional direction in this regard, looking to overall economic and commercial

realities in interpreting the word "competition" as used in those amendments. See, *e.g.*, *FTC* v. *Morton Salt Co.*, *supra*.[40] As the court succinctly put it in *Krug* v. *International Tel. & Tel. Co.*, 142 F. Supp. 230, 236 (D.N.J. 1956), a case involving price discriminations between a wholesaler and a direct-buying retailer:

> "The wholesaler is one of the immediate purchasers from the manufacturer and it would seem to make no difference that his injury was not suffered by his inability to compete with others on his own distributive level but by the failure of his customers to meet the competition of another immediate purchaser from the manufacturer."

See also, *Guyott Co.* v. *Texaco, Inc.*, 261 F. Supp. 942, 950-51 (D. Conn. 1966).

Employing the same essential rationale, two district courts recently ruled that Section 2(a) prohibited price discriminations between wholesalers in circumstances where both the favored and disfavored purchasers resold to retailers before any direct competitive confron-

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[40] *Morton Salt* involved a situation where five direct-buying retailers (chain stores) purchased salt at a lower price than wholesale customers of the suppliers. "As a result of this low price these five companies have been able to sell Blue Label salt at retail cheaper than wholesale purchasers from respondent could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores." 334 U.S., at 41. Affirming the Federal Trade Commission's finding of a violation of Section 2(a), the Court ruled (*id.*, at 46-47):

> "Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay."

tation occurred. *Ingram* v. *Phillips Petroleum Co.,* 259 F. Supp. 176 (D.N.M. 1966); *McCormack* v. *Theo. Hamm Brewing Co.,* 284 F. Supp. 158 (D. Minn. 1968). In *Theo. Hamm, supra,* at 163, the court observed that it "should not remain blind to the fact that a distributor's success depends in large part upon the success of the retailers with which it deals." Similarly, the court in *Ingram* ruled that the favored and disfavored wholesalers were "in practical competition" because the retailers served by each, while located in different towns, competed for the patronage of persons who "shop in both towns and patronize businesses in both places." 259 F. Supp., at 182.

The question whether Perkins and Signal were "in practical competition" is a factual one which, on the record below, the jury properly could have answered in the affirmative. As the testimony of Dr. Mund indicated, the success or failure of wholesale gasoline distributors is directly related to the success or failure of the retail outlets dispensing their gasoline (Tr. 2504). In the final analysis, as the court of appeals observed, it was the diversion of sales (and profits) from the retail outlets served by Perkins to the Regal retail outlets served by Signal that "adversely affected" Perkins' business (A. 109 fn. 6). The jury reasonably could have concluded that that fact was of sufficient importance to warrant, if not compel, a finding that Perkins and Signal were competitors, despite Standard's asserted lack of "evidence in the record that petitioner and Signal ever competed for the trade of anyone" (see Br. in Opp. 13) and the interposition of Western Hyway between Signal and the Regal retail outlets.

Here again the reasonableness of the jury's conclusion is evidenced by the findings of the Federal Trade Commission's *Report on Anticompetitive Practices in the Marketing of Gasoline, supra.* As that Report noted (p. 3), apart from competition at the supplier level, direct competition in gasoline marketing occurs almost solely at the retail level because intermediate distributors (such as wholesalers) are essentially locked in to one supplier and specific retail outlets:

> "[J]obber and retail customers are secured through ownership or contractual arrangements which have the effect of making the product of one supplier the only product dispensed by a given outlet. A distributor or dealer's contractual arrangements with his supplier, his investment, brand commitment, and other factors, weigh heavily against his shifting from one supplier to another. The suppliers, minimally concerned with retention of wholesale customers, focus their primary competitive endeavor at the retail level."

The jury verdict against Standard, in short, demonstrates a recognition that in the realities of gasoline marketing "[t]he retail stations . . . are the instrumentalities through which competition for this ultimate market is waged." *Standard Oil Co.* v. *United States,* 337 U.S. 293, 323 (1949) (Mr. Justice Jackson dissenting). That verdict should have been permitted to stand.

IV.

THE COURT OF APPEALS ERRED IN HOLDING THAT PERKINS' CLAIM WAS DEFEATED BY HIS FAILURE TO ESTABLISH THAT THE SUBSIDIARIES IN SIGNAL'S CHAIN OF DISTRIBUTION WERE MERE TOOLS OF THE FAVORED PURCHASER.

Much of the gasoline Standard sold to Signal (one of its favored purchasers) in the Pacific Northwest was resold by Signal to Western Hyway which, in turn, resold it to Regal (A. 109 fn. 6). During the claim period "Signal was in a position to exercise control over Regal," as the court of appeals recognized, because it owned 60 percent of Western Hyway's stock and Western Hyway owned 55 percent (and later 100 percent) of Regal's stock (*ibid.*). While these facts are not critical in the context of the arguments developed in Points II and III, *supra,* they are nonetheless important in that context insofar as they provided the jury with an additional reason for concluding that the price advantages Signal received from Standard supported Regal's price war, causing Perkins' destruction. Beyond this, the family relationship existing among Signal, Western Hyway and Regal gives rise to an independent basis for reversing the decision below. The Ninth Circuit ruled that the actions of Regal and Western Hyway were not attributable to Signal because Signal did not exercise its power to control the operations of those firms. That ruling was in error.

The question whether a parent corporation actually controls the operations of its subsidiaries is a factual one, and the record below contains evidence from which the jury properly could have inferred that Signal did, in fact, control Western Hyway and Regal to the extent necessary to accomplish Perkins' destruction.

We begin with the undisputed premise, acknowledged by the court of appeals, that the ultimate power to direct Regal's activities lay in the hands of Signal (A. 109 fn. 6). Signal therefore could (and surely would) have stopped Regal's price-cutting activities had a deteriorating retail price structure not been in accord with its overall Pacific Northwest marketing program. Moreover, those Standard executives familiar with Signal and its relationship to Regal accurately predicted that, unless Standard intervened, Signal would utilize its price advantages to enable Regal to " 'wreck' " the Pacific Northwest market as it had " 'done other places' " (A. 189, 201).

Both Standard and Signal ignored the separate corporate existence of Western Hyway when business reasons made it seem advantageous to do so. Thus, for example, Standard treated an offer by Union Oil Company to sell gasoline at a reduced price to Western Hyway as an offer directly to Signal (Ex. 1707, 1709, A. 653, 655; A. 438-39). And, what is more important, Signal officials themselves used the same offer to Western Hyway as the equivalent of an offer to Signal when attempting to extract a yet lower price from Standard (Tr. 5526-27).

Further proof that Signal in fact controlled Western Hyway and Regal is found in the confused testimony of Signal officials as to the precise nature of the intercorporate relationships between the companies, particularly the testimony of the auditor for Western Hyway and all the Regal companies (p. 10, fn. 11, *supra*). While informed corporate officials may be confused about the precise status of various controlled subsidiaries, the jury reasonably could have concluded that the men in charge surely would be able

to distinguish between controlled subsidiaries, on the one hand, and independent subsidiaries, on the other.

The jury, in sum, had before it evidence that the deteriorating Pacific Northwest price structure was in accord with Signal's marketing objectives, as well as evidence that Signal had, in fact, treated Western Hyway as its dependent transportation arm when such treatment accorded with the parent's business objectives. From these facts the jury could reasonably have inferred that Signal controlled Western Hyway and Regal during the claim period to the extent necessary to achieve its aim.[41]

It is important to emphasize that the underlying issue on this aspect of the case is whether a favored buyer can immunize a seller who grants price discriminations in its favor from the proscriptions of Section 2 of the Clayton Act through the manipulation and utilization of subsidiaries. That Signal may not have chosen to exercise to the hilt its power fully to control Western Hyway and Regal is not significant in this context. The price discriminations were granted by Standard to Signal. Whether Regal did or did not have the pricing flexibility to injure retailers served by Perkins depended solely upon whether Signal itself decided to use Standard's price advantages to support Regal's price cutting activities. Standard was well aware of Signal's capabilities and likely action in this regard (see fn. 19, p. 19, *supra*). Therefore, since Signal decided to do all that was necessary to drive

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[41] Moreover, the confusion within the Signal organization itself—among people who had access to all the facts—surely could persuade the jury that Perkins faced an insurmountable task in obtaining further evidence as to the precise manner in which Signal's power to control had in fact been exercised.

Perkins out of business, Standard should not be able to escape the consequences of its price discriminations merely because Signal may not have gone farther and exercised in all other respects its power to control the operations of Regal.

National Lead Co. v. *FTC*, 227 F. 2d 825 (7th Cir.), *rev'd on other grounds*, 352 U.S. 419 (1957), is not to the contrary. In that case, Anaconda Copper Mining Company and two wholly-owned subsidiaries were charged with pricing practices violative of Section 2(a) of the Clayton Act. After finding a violation by the subsidiary-seller, the Seventh Circuit refused to hold the parent, Anaconda Copper, responsible for the violation absent a showing that the subsidiary's separate corporate identity was a "mere fiction" and it was a "mere tool" of the parent. 227 F. 2d, at 829. While that stringent standard may be appropriate in assessing liability once a violation is found and it is clear that someone will be held responsible, it should not be permitted to enable a corporation to use subsidiaries "to circumvent a statute." See, *e.g.*, *Corn Products Refining Co.* v. *Benson*, 232 F. 2d 554, 565 (2d Cir. 1956). This is particularly true where, as here, the jury properly could have found that Signal exercised its power over its subsidiaries to the extent necessary to achieve the goal prohibited by the Clayton Act. Compare *Baim & Blank, Inc.* v. *Philco Corp.*, 148 F. Supp. 541, 544 (E.D.N.Y. 1957).

One additional point deserves brief mention. Standard argued that its price discriminations in favor of Signal were lawful as lower prices offered "in good faith to meet the equally low price of a competitor. . ."

(15 U.S.C. § 13(b)), Union Oil Company (see p. 64, *supra*). The jury, in returning a verdict against Standard, implicitly rejected this defense, and the court of appeals did not discuss the legal merits thereof. Attempting to provide guidance for the trial judge during the new trial it had ordered, the court criticized two actions he had taken relating to this defense. But the court nowhere ruled that those actions constituted reversible error.

The first criticized action was the judge's refusal to admit evidence of prices being offered by Union more than eight months after Standard had reduced its price (A. 116). In so ruling the trial judge clearly exercised his discretion in a proper manner. Whatever slight probative value, if any, that evidence might have had as "the basis for an inference that the prices were those offered during the critical period by Union . . ." (A. 116) would have been far outweighed by the confusion engendered by interjecting a collateral issue into the case: whether Union's offer of a lower price, which followed Standard's price reduction, was made in reaction to Standard's price reduction, not *vice versa*. See, *e.g.*, *Checker Motors Corp* v. *Chrysler Corp.*, 283 F. Supp. 876, 889-90 (S.D.N.Y. 1968), *aff'd*, 1969 Trade Cases ¶ 72,672 (2nd Cir. 1969), *Pet. for cert.* filed March 14, 1969 (No. 1156, O.T. 1968).

Secondly, the court of appeals criticized the judge's charge on Standard's meeting competition defense. The instruction in question reads as follows:

> "Before the defense of good faith meeting of competition may be used by the defendant under the provisions of the law, there must have been a definite offer which was extended by a competitor of defendant Standard to a customer of defendant

and defendant must have been aware of such offer and must have acted in good faith in meeting such competitive offer. Therefore, Standard cannot use this defense unless it knew or was given to reasonably believe while acting in good faith that its customer, Signal Oil and Gas Company, did in fact receive a competitive offer from another potential supplier for like products under similar circumstances, and on or before the time Standard's lower price was extended to Signal Oil and Gas Company and Standard then acted in good faith in meeting such competitive offer." [A. 64.]

The Ninth Circuit, emphasizing the phrase "definite offer," held that that part of the instruction, "standing alone," was clearly erroneous (A. 116). The court went on to observe what is clear from the above quotation—that the questioned language did not stand alone, it was immediately followed by language "which correctly stated the rule" (A. 117 fn. 10). Assuming *arguendo* that the Ninth Circuit's suggestion of error was correct, the short answer is that instructions must be "considered as a whole." *E.g. Sweet Milk Co.* v. *Stanfield,* 353 F. 2d 811, 813 (9th Cir. 1965). So considered, the charge below plainly did not constitute reversible error. See, *e.g. Smith* v. *Wire Rope Corp.,* 383 F. 2d 186, 188 (8th Cir. 1967); *Standard Oil Co.* v. *Perkins,* 347 F. 2d 379, 389 (9th Cir. 1965); *United States ex rel Marcus* v. *Hess,* 41 F. Supp. 197, 217 (W.D.Pa. 1941), *rev'd on other grounds,* 127 F. 2d 233 (3rd Cir.), *rev'd on other grounds,* 317 U.S. 537 (1943).

V.

THE JURY'S AWARD OF DAMAGES SHOULD BE REINSTATED AS A JUST AND REASONABLE ASSESSMENT OF THE DAMAGE SUSTAINED BY PETITIONER AS A RESULT OF STANDARD'S ANTITRUST VIOLATION.

This case, as the Ninth Circuit acknowledged, is "factually complicated" (A. 115), and Standard's discriminatory conduct was pervasive and far reaching. Its price discriminations in favor of Signal and the Branded Dealers permitted them to support retail price wars throughout much of the Pacific Northwest. Moreover, its discriminations included the granting of varying price-related benefits as well as price advantages to the favored purchasers—requiring assessment of Sections 2(a), 2(d) and 2(e) of the amended Clayton Act. In addition, its principal favored customer, Signal, sold directly to competitors of Perkins as well as to Regal through Western Hyway. See the Statement, pp. 9-18, 20-21, *supra*.

After hearing all the evidence and deliberating for two days, the jury returned a verdict against Standard, awarding Perkins $336,404.57 in actual damages. The Ninth Circuit set aside the entire verdict and remanded the case for a new trial on the theory that, since Regal's conduct, as a matter of law, could not be part of Standard's Section 2(a) violation, "the detrimental effect Regal exerted upon competition is not attributable to and would not support an award of damages against Standard" (A. 108-09). A ruling in favor of petitioner on any one of the grounds discussed in Points II, III, and IV above would necessarily require reinstatement of Perkins' damages attributable to Regal's conduct. And reinstatement of those damages would

terminate this litigation, except for one remaining minor question discussed below.

Following its ruling as to the Regal-caused damages, the court observed that (A. 110)—

> "[i]nasmuch as the case must be returned to the district court and tried anew, we believe it appropriate to briefly comment upon several of Standard's remaining points."

In the remainder of its opinion the court made a few rulings on the subject of damages. Thus, it held, favorably to petitioner, that diminution of the going concern value of his business was an element "of injury properly the subject of damages" (A. 113). The court also ruled that the following items were not proper elements of damages as to Perkins' individual claim (*ibid.*):

> "that the Perkins corporations did not pay him 1(a) an agreed brokerage fee for securing their gasoline; (b) rentals on leases of service stations and other property, and (c) other indebtedness; (2) that he was unable to collect rentals for service stations leased to independent operators. . . ."

Assuming *arguendo* that the court would have set aside the entire award in favor of Perkins (as an individual) on the above ground had it not previously decided that a remand was essential for a different reason—a highly doubtful proposition—it is clear that the court's ruling was erroneous.[42] That ruling improperly usurped the

[42] The remainder of this brief deals only with Perkins' individual claim since the Ninth Circuit found no error (apart from the Regal situation) in the claims made on behalf of the Perkins corporations (see A. 112). The jury's untrebled award to Clyde Perkins individually was $185,022.52 (A. 105 fn. 1).

traditional rôle of the jury in awarding damages in private antitrust suits—a role which this Court consistently has upheld.

In *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 564 (1931), this Court held the following criteria applicable to a jury's assessment of damages in private antitrust actions:

> " 'Juries are allowed to act upon probable and inferential, as well as direct and positive proof. *And when, from the nature of the case, the amount of damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount;* so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.' " [Emphasis added.]

The Court in *Story Parchment* went on to reinstate the jury verdict, reversing the court of appeals' holding that the plaintiff had failed to prove that depreciation in value of its plant had been caused by the antitrust violation.

In the same vein, *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 379 (1927), held that, while the damage award of a jury cannot be predicated upon speculation, it is legally sufficient if the award is based upon data allowing the jury, as a matter of reasonable inference, to assess the probable loss inflicted by the antitrust violation. Once that determination is made —

> "the question as to amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is conclusive." [*Ibid.*]

To the same effect is, *e.g., Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368, 392 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957), where the court ruled that "the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' "

In disregard of this long-standing division between the role of the appellate court and the role of the jury in awarding damages in private antitrust actions, the Ninth Circuit—focusing upon a few isolated items of evidence out of a record encompassing over six thousand pages of transcript and hundreds of exhibits—nullified the jury's entire award of damages to Clyde Perkins individually. In so doing, the court not only misapprehended its proper role in reviewing jury damage awards, it also misunderstood the character of the questioned evidence and the trial court's instructions on the issue of damages.

The trial judge's charge to the jury on damages outlined several elements which could be considered in evaluating the damage claims of Perkins (A. 65-67). In view of the three separate claims involved (those of Perkins as an individual and the two corporations), the judge admonished the jury not to permit recovery on the same element of damage more than once (A. 67). Continuing, he charged that while recovery could be had by Clyde Perkins individually for diminution in "the good will or going concern value of [his] property," based on an assessment of probable future

profitable operations, such a recovery would be proper only after the jury had first determined that Perkins' property possessed a goodwill or going concern value prior to the time of the alleged violation (A. 68-69).

Defining the separate categories of evidence that could be considered by the jury in evaluating damages, the trial judge never even referred to monies owed but not paid to Clyde Perkins as brokerage fees, rentals on leases of service stations and other property, other indebtedness, and rentals on service stations leased to independent operators (see A. 64-73)—the items held improper as elements of damage by the Ninth Circuit (A. 113).[43] In fact, the trial judge charged the jury, as a matter of law, that Perkins could not recover for "any diminution in the value of real or personal property owned by him and leased to Perkins of Oregon or Perkins of Washington, or to independent operators or service stations or bulk plants supplied by said corporations" (A. 71). The jury was charged, in sum, as to Perkins' leaseholds and other real and personal property, that petitioner could only recover damages to the extent that the going concern or goodwill value of those holdings had been diminished by Standard's unlawful conduct.

In addition, the jury was instructed that it could not award damages predicated on the goodwill or going concern value of Perkins' holdings and, at the same time, award damages for loss of net profits due to loss of sales or loss of customers (A. 69). The jury also

[43] Neither did Perkins damage computations, introduced through his accountant, make any mention of those items (see Ex. 82B, C, D, E, F, G-2, J, L, M, O, P, A. 528-40; Ex. 82G-1, N).

was instructed that it could not base any findings on conjecture or speculation (A. 72). Viewed in light of the trial judge's careful and detailed instructions, the evidence which concerned the Ninth Circuit could not have been involved in the jury's award of damages.

That evidence, moreover, was relevant and admissible on the question whether Perkins individually had suffered injury by reason of Standard's unlawful conduct. Before Perkins was entitled to claim and recover "damages" for loss of the going concern value of his property, he had to establish that Standard's unlawful conduct had "injured" him in his business or property.[44] Under Section 4 of the Clayton Act, injury is a prerequisite to standing to sue, and damages are the laws cognition of injury. This Court has long recognized the basic distinction between the fact of harm—legal injury—and the amount of damages incurred as a result of that injury. See, *e.g., Story Parchment Co.* v. *Paterson Parchment Paper Co., supra,* 282 U.S., at 562; Timberlake, *Federal Treble Damage Antitrust Actions* § 20.02, at 289-93 (1965). And while proof of injury often will be interwoven with proof of damages, there is no legal requirement that the two be coextensive. In this case, Standard's unlawful conduct destroyed Perkins' business, and petitioner understandably sought to evidence a complete picture of that destruction—with the questioned evidence being part of that picture. Certainly Standard is in no position to complain that

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[44] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that "[a]ny person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the *damages* by him sustained. . . ." [Emphasis added.]

some of the injury it wrought upon Perkins was evidenced but not submitted to the jury as an element of damages.

The Ninth Circuit ruled that the questioned evidence was improper on the rationale that lost rentals and debts cannot be claimed as antitrust damages by "the bystander who was hit but not aimed at," quoting *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 363 (9th Cir. 1955). It is difficult to conceive of a more inapposite quotation in the circumstances of this action. It was Perkins who paid Standard the discriminatorily high price. He was the precise person at whom the unlawful conduct was aimed. And, indeed, Standard had been put on notice that its aim was hitting the mark (see the Statement pp. 18-20, *supra*). On these facts Perkins compellingly established his right to recover all damages to his business caused by Standard's unlawful conduct, even under the most stringent test of recovery—that a "plaintiff must show that his loss was not a consequence of injury to someone else, *i.e., that he had direct relations with the wrongdoer. . . .*" Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act,* 64 Colum. L. Rev. 570, 581-85 (1964), and cases cited therein (emphasis added); see *Loeb* v. *Eastman Kodak Co.,* 183 Fed. 704 (3rd Cir. 1910).

Karseal itself supports Perkins' right to recover. There, the defendant had entered into exclusive dealing arrangements with retailers, requiring them to purchase car wax (among other products) only from it or suppliers designated by it. Karseal was a manufacturer of car wax which, through a distributor, attempted to sell to the same retailers. The defendant argued that since its restraint of trade had been im-

pressed upon individual retailers one step removed from Karseal's distributor, and yet another step removed from Karseal, any damages suffered by the manufacturer were not cognizable under Section 4 of the Clayton Act. The court disagreed, holding that the exclusive dealing arrangements had the necessary effect of denying competitive manufacturers of car wax access to a substantial number of potential outlets, and that Karseal therefore fell well within the target area of the illegal practices. *A fortiori,* Perkins, who dealt directly with Standard, was within the "target area" as defined in *Karseal.* See also *Hoopes* v. *Union Oil Co.,* 374 F. 2d 480, 484-85 (9th Cir. 1967).

In conclusion, the ruling of the court below, if permitted to stand, would make jury damage awards in treble damage actions fragile vessels indeed—subject to complete destruction by any possible evidentiary mishap which might occur at trial. Moreover, it would do so in circumstances where the court did not so much as suggest that the total award in favor of Perkins individually was unjust and unreasonably high, as manifestly it could not do. For example, Perkins' evidence showed that, as a result of Standard's discriminations in favor of Signal alone, the going concern value of the stations he owned decreased by $136,441, and the going concern value of the stations he leased decreased by $29,915 (Ex. 82J, 82L, A. 535, 536)—totaling some $20,000 less than the jury award to him individually.

Standard discriminated against Perkins in price, service and payments for two and one-half years throughout his entire territory—violating three separate sections of the amended Clayton Act in the process. As a result, Perkins' business was ruined. Big violations of law engender considerable evidence of injury,

and the violator runs the risk that the jury may not precisely delineate the point where legal injury ends and recoverable damages begin. But in such cases, as in those where some speculation is required of the jury due to the nature of the antitrust violation, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). The jury verdict in favor of Perkins should be reinstated.

CONCLUSION

The judgment of the Ninth Circuit should be reversed. The judgment of the district court should be affirmed, and the award to petitioner of $1,298,213.71 in damages and attorney's fees should be reinstated.

Respectfully submitted,

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APPENDIX A

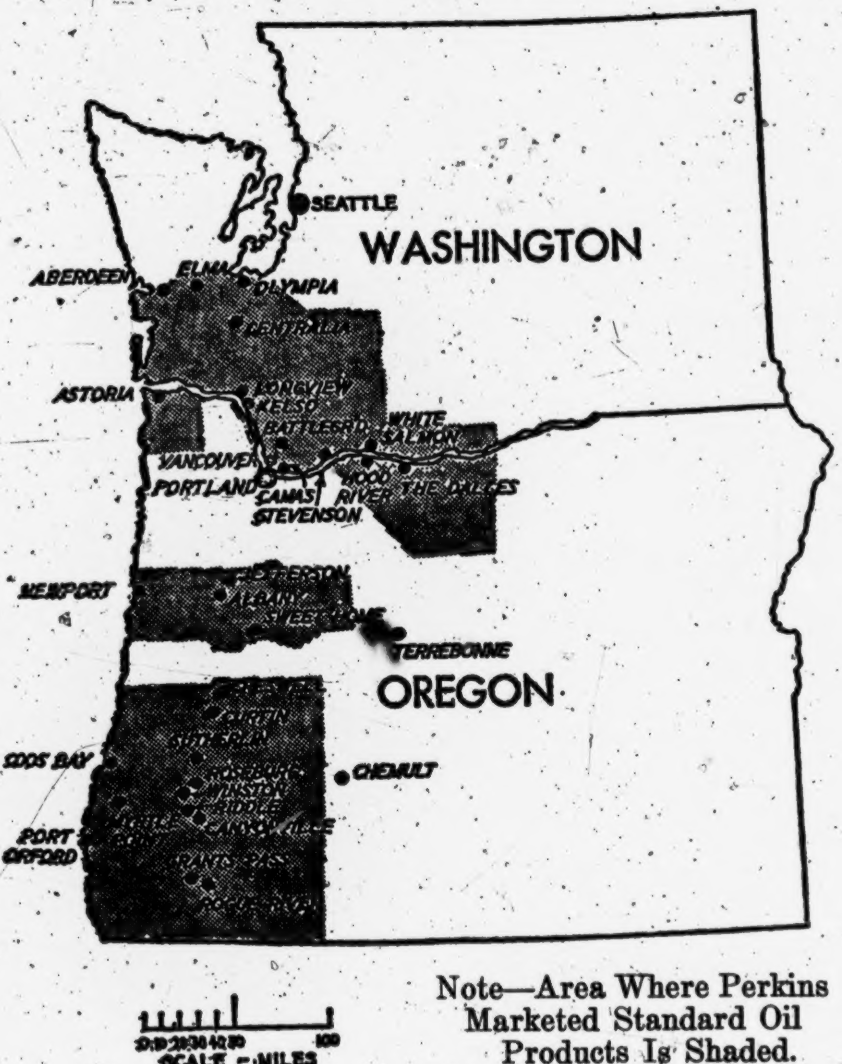
EXHIBIT NUMBER	OFFERED	RECEIVED IN EVIDENCE
1	2143*	2143
2	1307	1307
3	220	220
4A	1408	1408
4B	291	291
5	313	313
6	313	313
21A	2464-65, 3545	2485, 3546
23B	1972	1975
23C	1972	1975
23D	1972	1975
23H	1455	1455
63	2906	2907
81J, K, S, T, U	2009	2012
82B	3631	3639
82C	3593	3623
82D	3593	3623
82E	3650	3819
82F	3650	3819
82G-1	3687	3687
82G-2	3685	3695
82J	3716	3729
82L	3741	3744
82M	3747	3749
82N	3776	3782
82O	3786	3790-91
82P	3850	3851
93B	3305	3308-09
93B-1	3295	3303
93C	3334	3335
93D	3350, 3354	3355
93 I	3013, 3020, 3418	3418
93M	3416, 2988	3417, 3011
93N	3416	3417
99	2868	2869-70, 2876

* All page references in this Appendix are to the unprinted transcript of proceedings in the district court.

EXHIBIT NUMBER	OFFERED	RECEIVED IN EVIDENCE
102	1249	1249
106C	2207	2221
235	2640	2642
239	2404	2406
280B-1	2325	2325-26
282C-5	1352	1352-53
283A	2436	2437
284A, B	3075	3077
335	2686	2686
343A	2940	2940
343B	2946	2946
349	3098	3098
1003	1593	1594
1449	4276	4282
1453B	4522	4522
1453X, Y	4544	4545
1453AA, BB	4544	4545
1465	5143	5144
1515B	5619	5620
1524	4307-08	4312
1550	4321	4361
1707	5523	5524
1709	5533	5533

APPENDIX B

MARKETING AREA OF CLYDE A. PERKINS' OPERATIONS



Note—Area Where Perkins Marketed Standard Oil Products Is Shaded.

SOURCE — Ex. 1449, A. 587